

1-30-2008

## Rhoades v. State Clerk's Record v. 2 Dckt. 34198

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## 24

IN THE

GENE FRANCIS STUART

Petitioner

and

Appellant

**VS.**

STATE OF IDAHO

Respondent

and

Appealed from the District Court of the Second  
Judicial District for the State of Idaho, in and

for Clearwater County

Hon. Ron Schilling District Judge

Joan M. Fisher and Oliver Loewy  
Capital Habeas Unit, Federal Defender Services  
of Idaho, 317 West 6th Street, Suite 204  
Moscow, ID 83843

Attorney S for Appellant\_\_\_\_\_

L. LaMont Anderson, Attorney General's Office,  
P.O. Box 83720, Boise, ID 83720-0010 and  
Lori Gilmore, Clearwater County Prosecutor's  
Office, P.O. Box 2627, Orofino, ID 83544

Attorney S for Respondent\_\_\_\_\_

Filed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_

JAN 0 2 1955

**Clerk**

By \_\_\_\_\_ Deputy

Supreme Ct. \_\_\_\_\_ Court of Appeals \_\_\_\_\_  
Entered on AFS by: \_\_\_\_\_

CAXTON PRINTERS, CALDWELL, IDAHO 168330

34198 + 34199

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State of Idaho vs. Gene Francis Stuart

Date	Code	User		Judge
10/1/1981	NEWC	MONEY	New Case Filed	Ron Schilling
12/8/1992	XXXX	MONEY	For Information Prior To This Date See Case File	Ron Schilling
	YYYY	MONEY	Partial Payment History Only See File For Complete Payment History	Ron Schilling
	RMK1	CARRIE	Old Manual Docket # 8495	Ron Schilling
	RMK9	CARRIE	Appeal To Supreme Court	Ron Schilling
	NOTC	CARRIE	Notice Of Lodging Of Transcript	Ron Schilling
5/24/1993	PETN	CINDY	Petition For Allowance Of Attorney Fees And	Ron Schilling
	MISC	CINDY	Costs	Ron Schilling
3/29/1993	ORDR	CARRIE	Order For Attorney Fees	Ron Schilling
3/3/1993	PETN	BARBIE	Petition For Allowance Of Attorney Fees And	Ron Schilling
	MISC	BARBIE	Costs	Ron Schilling
3/24/1993	ORDR	VICKY	Order Allowing Attorney Fees And Costs	Ron Schilling
	CERT	VICKY	Certificate Of Delivery	Ron Schilling
2/9/1994	PETN	CINDY	Petition For Allowance Of Attorney Fees And	Ron Schilling
	MISC	CINDY	Costs	Ron Schilling
4/13/1994	ORDR	CINDY	Order Allowing Attorney Fees And Costs	Ron Schilling
0/11/1994	MOTN	CINDY	Motion For Relief From Judgment	Ron Schilling
	MEMO	CINDY	Memorandum In Support Of Motion For Relief	Ron Schilling
	MISC	CINDY	From Judgment	Ron Schilling
0/20/1994	NOTC	VICKY	Notice Of Hearing	Ron Schilling
	HRSC	VICKY	Hearing Scheduled - (11/02/1994) Ron Schilling	Ron Schilling
0/21/1994	NOTC	CARRIE	Notice Of Hearing	Ron Schilling
	PETN	CARRIE	Petition For Allowance Of Attorney Fees	Ron Schilling
1/1/1994	BRIE	SUE	Brief In Opposition To Motion For Relief	Ron Schilling
	MISC	SUE	From Judgment	Ron Schilling
1/2/1994	CMIN	CARRIE	Court Minutes	Ron Schilling
	HRHD	CINDY	Hearing Held	Ron Schilling
1/3/1994	ORDR	CARRIE	Order Denying Petitioner's Motion	Ron Schilling
1/9/1994	APSC	CARRIE	Appealed To The Supreme Court	Ron Schilling
1/18/1994	ORDR	SUE	Order Augmenting Appeal Record	Ron Schilling
2/22/1994	LODG	VICKY	Lodged - Transcript	Ron Schilling
2/23/1994	NOTC	VICKY	Notice Of Lodging Of Transcript	Ron Schilling
12/1995	MISC	CARRIE	Objection To The Reporter's Transcript	Ron Schilling
30/1995	STIP	CARRIE	Stipulation Re/; Transcript	Ron Schilling
8/1995	ORDR	CARRIE	Order Regarding Transcript	Ron Schilling
23/1995	ORDR	VICKY	Opinion On Supreme Court Appeal Docket 20060	Ron Schilling
21/1995	PETN	CARRIE	Petition For Allowanfe Of Attorney Fees	Ron Schilling

State of Idaho vs. Gene Francis Stuart

Date	Code	User		Judge
5/9/1995	ORDR	VICKY	Order Allowing Attorney Fees	Ron Schilling
	ORDR	VICKY	Order Allowing Attorney Fees	Ron Schilling
8/3/1995	AFFD	SUE	Affidavit Of Counsel	Ron Schilling
	MOTN	SUE	Motion For Order Permitting Withdrawal And	Ron Schilling
	MISC	SUE	Substitution Of Counsel On Appeal	Ron Schilling
	PETN	SUE	Petition For Allowance Of Attorney Fees	Ron Schilling
9/1/1995	ORDR	CARRIE	Order Allowing Attorney Fees	Ron Schilling
11/9/1995	ORDR	CARRIE	Order Authorizing Withdrawal Of Attorney	Ron Schilling
	ORDR	CARRIE	And Appointment Of A New Attorney	Ron Schilling
1/10/1996	ORDR	CARRIE	Order Denying Respondent's Petition For Rehearing	Ron Schilling
1/19/1996	MISC	CARRIE	Remittitur	Ron Schilling
3/11/1996	ORDR	SUE	Order Appointing Counsel	Ron Schilling
4/11/1996	LODG	VICKY	Lodged - Notice From Supreme Court Of Filing	Ron Schilling
	LODG	VICKY	Of Petition For Certiorari	Ron Schilling
4/26/1996	LODG	SUE	Order Denying Petition For Rehearing	Ron Schilling
5/17/1996	REMT	VICKY	Amended Remittitur And Order	Ron Schilling
5/7/1996	AFFD	VICKY	Affidavit In Support Of Motion For Atty Fees	Ron Schilling
	MOTN	VICKY	Motion For Attorney Fees	Ron Schilling
	ORDR	VICKY	Order For Attorney Fees	Ron Schilling
5/20/1996	NOTC	SUE	Notice Setting Scheduling Conference	Ron Schilling
5/24/1996	RHRG	VICKY	Request For Status Conference	Ron Schilling
5/18/1996	NOTC	SUE	Amended Notice Setting Scheduling Conference	Ron Schilling
5/15/1996	CMIN	SUE	Court Minutes	Ron Schilling
5/26/1996	ORDR	SUE	Order Setting Scheduling	Ron Schilling
5/5/1997	LODG	SUE	Petitioner's Memo. On Remand From Sup. Ct.	Ron Schilling
5/14/1997	CMIN	SUE	Court Minutes	Ron Schilling
5/25/1997	BRIE	NANCY	State's Reply Brief	Ron Schilling
5/27/1997	RESP	NANCY	Petitioner's Response To State's Reply Brief	Ron Schilling
5/9/1997	ORDR	SUE	Order For Attorney Fees	Ron Schilling
	MOTN	SUE	Motion For Attorney Fees	Ron Schilling
5/19/1997	ORDR	SUE	Order Setting Hearing	Ron Schilling
5/20/1997	ORDR	SUE	Order Setting Telephonic Scheduling Conf.	Ron Schilling
5/8/1997	CMIN	SUE	Court Minutes	Ron Schilling
5/9/1997	ORDR	SUE	Order Setting Hearing	Ron Schilling
5/21/1997	ORDR	SUE	Amended Order Setting Hearing	Ron Schilling
5/12/1997	HRHD	SUE	Hearing Held (in Boise)	Ron Schilling
	CMIN	SUE	Court Minutes	Ron Schilling

State of Idaho vs. Gene Francis Stuart

Date	Code	User		Judge
10/3/1997	MOTN	SUE	Motion For Attorney Fees	Ron Schilling
10/6/1997	ORDR	SUE	Order For Attorney Fees	Ron Schilling
	ORDR	SUE	Order For Attorney Fees	Ron Schilling
8/6/1998	ORDR	SUE	Opinion And Order On Remand	Ron Schilling
8/17/1998	CMIN	SUE	Court Minutes	Ron Schilling
9/16/1998	CMIN	SUE	Court Minutes	Ron Schilling
9/28/1998	ORDR	SUE	Scheduling Order	Ron Schilling
10/21/1998	ORDR	SUE	Order For Attorney Fees	Ron Schilling
	MOTN	SUE	Motion For Attorney Fees	Ron Schilling
11/20/1998	MOTN	SUE	Motion For Protective Order	Ron Schilling
	AFFD	SUE	Affd. In Support Of State's Motion For P.o.	Ron Schilling
	MISC	SUE	State's Witnesses	Ron Schilling
12/24/1998	MOTN	SUE	Motion To Continue	Ron Schilling
	AFFD	SUE	Affidavit In Support Of Motion To Continue	Ron Schilling
	MISC	SUE	Plaintiff's Witness Disclosure	Ron Schilling
12/31/1998	CMIN	SUE	Court Minutes	Ron Schilling
1/4/1999	ORDR	SUE	Order Granting Motion To Continue	Ron Schilling
1/15/1999	STIP	SUE	Stipulation For Protective Order	Ron Schilling
1/28/1999	CDIS	SUE	State's Supplemental Discovery For Phase Ii	Ron Schilling
	MISC	SUE	State's Investigation Case File	Ron Schilling
2/4/1999	CMIN	SUE	Court Minutes	Ron Schilling
2/9/1999	NOTC	SUE	Notice Of Taking Deposition Duces Tecum	Ron Schilling
	NOTC	SUE	Notice Of Taking Deposition Duces Tecum	Ron Schilling
	NOTC	SUE	Notice Of Taking Deposition Duces Tecum	Ron Schilling
	NOTC	SUE	Notice Of Taking Deposition Duces Tecum	Ron Schilling
	NOTC	SUE	Notice Of Taking Deposition Duces Tecum	Ron Schilling
2/11/1999	ORDR	SUE	Scheduling Order	Ron Schilling
2/22/1999	CDIS	SUE	Amended State's Discovery Compliance Phase Ii	Ron Schilling
2/10/1999	CDIS	SUE	Second State's Supplemental Discovery Phase 2	Ron Schilling
2/17/1999	MISC	SUE	Phase Ii State's First Requests For	Ron Schilling
	MISC	SUE	Admissions, Request For Production Of	Ron Schilling
	MISC	SUE	Documents & Interrogatories Propounded To	Ron Schilling
	MISC	SUE	Plaintiff	Ron Schilling
2/23/1999	MOTN	SUE	Motion For Protective Order	Ron Schilling
	AFFD	SUE	Affidavit Of Gene Francis Stuart	Ron Schilling
2/5/1999	MISC	SUE	Phase Ii Supplemental State's Witness List	Ron Schilling
2/28/1999	NOTC	SUE	Notice Of Hearing (in Lewiston)	Ron Schilling

State of Idaho vs. Gene Francis Stuart

Date	Code	User		Judge
4/29/1999	MOTN	SUE	Motion To Compel	Ron Schilling
	AFFD	SUE	Affidavit Of John A. Swayne Supporting Motion	Ron Schilling
4/30/1999	NOTC	SUE	Notice Of Compliance With Discovery	Ron Schilling
5/4/1999	MISC	SUE	Phase Ii 2nd Supplemental State's Witness Lst	Ron Schilling
	NOTC	SUE	Notice Of Hearing (in Lewiston)	Ron Schilling
5/5/1999	ORDR	SUE	Order For Attorney Fees	Ron Schilling
5/6/1999	CMIN	SUE	Court Minutes	Ron Schilling
5/7/1999	CDIS	SUE	4th State's Supplemental Discovery	Ron Schilling
	CDIS	SUE	3rd State's Supplemental Discovery	Ron Schilling
5/12/1999	CDIS	SUE	5th State's Supplemental Discovery	Ron Schilling
	MISC	SUE	Phase Ii 3rd Supplemental Witness List	Ron Schilling
5/13/1999	CDIS	SUE	6th State's Supplemental Discovery	Ron Schilling
5/14/1999	CDIS	SUE	7th State's Supplemental Discovery	Ron Schilling
	MISC	SUE	Amended Phase Ii 3rd State's Witness List	Ron Schilling
5/19/1999	CDIS	SUE	8th State's Supplemental Discovery	Ron Schilling
5/24/1999	AFFD	SUE	Affidavit For Out-of-county Subpoena	Ron Schilling
	AFFD	SUE	Affidavit For Out-of-county Subpoena	Ron Schilling
	AFFD	SUE	Affidavit For Out-of-county Subpoena	Ron Schilling
	AFFD	SUE	Affidavit For Out-of-county Subpoena	Ron Schilling
	AFFD	SUE	Affidavit For Out-of-county Subpoena	Ron Schilling
	AFFD	SUE	Affidavit For Out-of-county Subpoena	Ron Schilling
	CERT	SUE	Cert. Under Uniform Act To Secure Witness	Ron Schilling
	PETN	SUE	Petition To Compel Attendance	Ron Schilling
	PETN	SUE	Petition To Compel Attendance	Ron Schilling
	CERT	SUE	Cert. Under Uniform Act To Secure Witness	Ron Schilling
	AFFD	SUE	Affidavit For Out-of-state Subpoena	Ron Schilling
	CERT	SUE	Cert. Under Uniform Act To Secure Witness	Ron Schilling
	AFFD	SUE	Affidavit For Out-of-state Subpoena	Ron Schilling
	PETN	SUE	Petition To Compel Attendance	Ron Schilling
	AFFD	SUE	Affidavit For Out-of-state Subpoena	Ron Schilling
	PETN	SUE	Petition To Compel Attendance	Ron Schilling
	CERT	SUE	Cert. Under Uniform Act To Secure Witness	Ron Schilling
	CERT	SUE	Cert. Under Uniform Act To Secure Witness	Ron Schilling
	AFFD	SUE	Affidavit For Out-of-state Subpoena	Ron Schilling
	PETN	SUE	Petition To Compel Attendance	Ron Schilling
5/25/1999	CERT	SUE	Cert. Under Uniform Act To Secure Witness	Ron Schilling
	AFFD	SUE	Affidavit For Out-of-state Subpoena	Ron Schilling

State of Idaho vs. Gene Francis Stuart

Date	Code	User		Judge
5/25/1999	PETN	SUE	Petition To Compel Attendance	Ron Schilling
	PETN	SUE	Petition To Compel Attendance	Ron Schilling
	AFFD	SUE	Affidavit For Out-of-state Subpoena	Ron Schilling
	CERT	SUE	Cert. Under Uniform Act To Secure Witness	Ron Schilling
	AFFD	SUE	Affidavit For Out-of-state Subpoena	Ron Schilling
	CERT	SUE	Cert. Under Uniform Act To Secure Witness	Ron Schilling
	PETN	SUE	Petition To Compel Attendance	Ron Schilling
6/7/1999	NOTC	SUE	State's Notice Of Taking Deposition	Ron Schilling
	PETN	SUE	Petition To Preserve Testimony By Depo.	Ron Schilling
	ORDR	SUE	Order Preserving Testimony	Ron Schilling
6/8/1999	ORDR	SUE	Order Re: In Camera Inspection	Ron Schilling
6/11/1999	SUBR	SUE	Subpoena Returned	Ron Schilling
	SUBR	SUE	Subpoena Returned	Ron Schilling
	CMIN	SUE	Court Minutes	Ron Schilling
6/14/1999	RDIS	SUE	Request For Discovery	Ron Schilling
6/15/1999	CDIS	SUE	9th State's Supplemental Discovery	Ron Schilling
6/16/1999	NOTC	SUE	Notice Of Summary	Ron Schilling
6/17/1999	CDIS	SUE	Amended 9th State's Supplemental Discovery	Ron Schilling
	MISC	SUE	Admission Of Service	Ron Schilling
6/22/1999	MISC	SUE	Amended Phase II 4th State's Witness List	Ron Schilling
6/27/1999	MEMO	SUE	State's Pre-hearing Memorandum (phase II)	Ron Schilling
6/28/1999	SUBR	SUE	Subpoena Returned	Ron Schilling
	SUBR	SUE	Subpoena Returned	Ron Schilling
	SUBR	SUE	Subpoena Returned	Ron Schilling
	SUBR	SUE	Subpoena Returned	Ron Schilling
	SUBR	SUE	Subpoena Returned	Ron Schilling
	SUBR	SUE	Subpoena Returned	Ron Schilling
	SUBR	SUE	Subpoena Returned	Ron Schilling
	SUBR	SUE	Subpoena Returned	Ron Schilling
	SUBR	SUE	Subpoena Returned	Ron Schilling
	HRHD	SUE	Hearing Held	Ron Schilling
	CMIN	SUE	Court Minutes	Ron Schilling
7/7/1999	ADVS	SUE	Case Taken Under Advisement	Ron Schilling
7/11/1999	AFFD	SUE	Affidavit In Support Of Motion For Atty Fees	Ron Schilling
	MOTN	SUE	Motion For Attorney's Fees	Ron Schilling
	ORDR	SUE	Order For Attorney's Fees	Ron Schilling
7/29/1999	EXLT	SUE	Exhibit List	Ron Schilling

State of Idaho vs. Gene Francis Stuart

Date	Code	User		Judge
5/5/2000	MOTN	SUE	Motion For Attorney's Fees	Ron Schilling
5/10/2000	MISC	SUE	State's Submission Of Supplemental Authority	Ron Schilling
5/23/2000	FFCL	SUE	Findings Of Fact And Conclusions Of Law	Ron Schilling
	DPHR	SUE	Disposition With Hearing	Ron Schilling
	FJDE	SUE	Judgment	Ron Schilling
	CSCP	SUE	Case Status Closed But Pending	Ron Schilling
5/26/2000	CMIN	SUE	Court Minutes	Ron Schilling
3/14/2000	FILM	RENEE	Judgment Filmed Jacket #cr43 D6-e14	Ron Schilling
	FILM	RENEE	Judgment Filmed Jacket #_cr44 A1-a6_____	Ron Schilling
	FILM	RENEE	Judgment Filmed Jacket #_cr43 D4-d5_____	Ron Schilling
3/29/2000	NOTC	SUE	Notice Of Appeal	Ron Schilling
	APSC	SUE	Appealed To The Supreme Court	Ron Schilling
7/21/2000	ORDR	SUE	Order For Attorney Fees	Ron Schilling
12/13/2000	ORDR	SUE	Order For Attorney Fees	Ron Schilling
5/9/2001	ORDR	SUE	Order For Attorney Fees	Ron Schilling
11/8/2001	ORDR	SUE	Order For Attorney Fees	Ron Schilling
1/9/2002	ORDR	SUE	Order Appointing Judge	Ron Schilling
1/18/2002	DPWO	SUE	Disposition Without Trial Or Hearing	Ron Schilling
	RMK9	SUE	Appeal Dismissed By Supreme Court	Ron Schilling
	REMT	SUE	Remittitur	Ron Schilling
	FJDE	SUE	Final Judgement, Order Or Decree Entered	Ron Schilling
1/28/2002	MISC	SUE	Death Warrant	Ron Schilling
3/19/2002	ORDR	SUE	Order For Attorney Fees	Carl B. Kerrick
3/2/2002	MOTN	SUE	Motion To Correct Illegal Sentence, To Vacate	Ron Schilling
	MISC	SUE	Sent. Of Death And For New Sentencing Trial	Ron Schilling
	AFFD	SUE	Affidavit In Support Of Mot. To Correct Sent.	Ron Schilling
	REOP	SUE	Reopen (case Previously Closed)	Ron Schilling
3/9/2002	CERT	SUE	Certificate Of Delivery	Ron Schilling
3/19/2002	ORDR	SUE	Order For Attorney's Fees	Carl B. Kerrick
3/30/2002	MOTN	SUE	Motion For Summary Judgment	Ron Schilling
	AFFD	SUE	Affidavit In Support Of Motion	Ron Schilling
	BRIE	SUE	Brief In Sup. Of Motion For Summary Dismissal	Ron Schilling
3/3/2002	CERT	SUE	Certificate Of Mailing	Ron Schilling
3/9/2002	NOTC	SUE	Notice Of Intent To File Opposition And	Ron Schilling
	MISC	SUE	Supporting Memorandum & Req. For Hearing	Ron Schilling
2/30/2002	ORDR	SUE	Order For Attorney Fees	Carl B. Kerrick
3/5/2003	MOTN	SUE	Motion For Limited Admission	Ron Schilling

State of Idaho vs. Gene Francis Stuart

Date	Code	User		Judge
3/6/2003	RESP	SUE	Petitioner's Response In Opposition To Mot.	Ron Schilling
	MISC	SUE	For Summary Dismissal Of Petition	Ron Schilling
3/24/2003	HRSC	VICKY	Hearing Scheduled - (04/09/2003)	Ron Schilling
4/8/2003	ORDR	VICKY	Order For Attorney's Fees	Carl B. Kerrick
4/9/2003	INHD	VICKY	Interim Hearing Held	Ron Schilling
	ORDR	VICKY	Order Granting Limited Appearance And Waiver	Ron Schilling
	CMIN	VICKY	Court Minutes	Ron Schilling
3/12/2003	ORDR	VICKY	Briefing Order	Ron Schilling
9/3/2003	ORDR	SUE	Order For Attorney Fees	Ron Schilling
9/24/2003	ORDR	SUE	Amended Order To Appoint Special Prosecutor	Ron Schilling
	MISC	SUE	Re:motion To Recall Remittitur And Remand	Ron Schilling
	MISC	SUE	For Resentencing Procedures	Ron Schilling
	CERT	SUE	Certificate Of Mailing	Ron Schilling
10/10/2003	AFFD	VICKY	Affidavit In Support Of Motion For Extension	Ron Schilling
	AFFD	VICKY	Of Time	Ron Schilling
	MOTN	VICKY	Motion For Extension Of Time	Ron Schilling
11/14/2003	BRIE	VICKY	Reply Brief In Support Of States Motion	Ron Schilling
	BRIE	VICKY	For Summary Dismissal	Ron Schilling
12/23/2003	ORDR	SUE	Order For Attorney's Fees	Ron Schilling
2/26/2004	HRSC	SUE	Hearing Scheduled - (03/03/2004)	Ron Schilling
3/2/2004	AFFD	SUE	Affd. In Support Of Mot. To Stay Proceedings	Ron Schilling
	MOTN	SUE	Motion To Stay Proceedings Pending Dispo.	Ron Schilling
3/3/2004	INHD	SUE	Interim Hearing Held	Ron Schilling
	CMIN	SUE	Court Minutes	Ron Schilling
	RMK9	SUE	Stay Pending Supreme Court Decision	Ron Schilling
3/17/2004	ORDR	SUE	Order Staying Proceedings pending dispostion in the Idaho Supreme Court	Ron Schilling
12/23/2005	HRSC	SUE	Hearing Scheduled (Telephonic Status Conference 01/06/2006 10:00 AM)	Ron Schilling
		SUE	Notice Of Hearing	Ron Schilling
	PROS	SUE	Prosecutor assigned Lori Gilmore	Ron Schilling
2/27/2005	MOTN	SUE	Motion to lift stay	Ron Schilling
6/6/2006	HRHD	SUE	Hearing result for Telephonic Status Conference held on 01/06/2006 10:00 AM: Hearing Held	Ron Schilling
	CMIN	SUE	Court Minutes	Ron Schilling
	HRSC	SUE	Hearing Scheduled (Telephonic Scheduling Conference 03/30/2006 10:00 AM)	Ron Schilling
		SUE	Notice Of Hearing	Ron Schilling

State of Idaho vs. Gene Francis Stuart

Date	Code	User	Judge
2/10/2006	BRIE	SUE	Petitioner's supplemental briefing in opposition to 1) motion for summary dismissal of petition for postconviction relief and/or writ of habeas corpus and 2) Rule 35 petition Ron Schilling
3/10/2006	BRIE	SHARON	Supplemental Brief in Support of Respondent's Motion for Summary Dismissal Ron Schilling
3/30/2006	HRHD	SUE	Hearing result for Telephonic Scheduling Conference held on 03/30/2006 10:00 AM: Hearing Held Ron Schilling
	CMIN	SUE	Court Minutes Ron Schilling
	HRSC	SUE	Hearing Scheduled (Motion 05/22/2006 10:00 AM) TO BE HELD AT THE MAXIMUM SECURITY PRISON IN BOISE Ron Schilling
5/18/2006	NOTH	SUE	Notice Of Hearing Ron Schilling
5/22/2006	AFFD	SUE	Affidavit of Susan Kathleen Stuart Ron Schilling
			Document sealed
	AFFD	SUE	Affidavit of Jim Bigley Ron Schilling
			Document sealed
	AFFD	SUE	Affidavit of Mary Jane Bigley Ron Schilling
			Document sealed
	AFFD	SUE	Affidavit of Gene Lee Dally Ron Schilling
			Document sealed
	AFFD	SUE	Affidavit of Daniel Heagy Ron Schilling
	AFFD	SUE	Affidavit of Malvin W. Kraft Ron Schilling
			Document sealed
	AFFD	SUE	Affidavit of Sharie Lee Kuhl Ron Schilling
			Document sealed
	AFFD	SUE	Affidavit of Robert Daniel McDowell Ron Schilling
	AFFD	SUE	Affidavit of Donna Marquette Ron Schilling
			Document sealed
	AFFD	SUE	Affidavit of Delores Mary Nichols Ron Schilling
			Document sealed
	AFFD	SUE	Affidavit of Claudia J. Petrie Ron Schilling
	AFFD	SUE	Affidavit of Doug Seeger Ron Schilling
	AFFD	SUE	Affidavit of Coby L. Smith Ron Schilling
	AFFD	SUE	Affidavit of Thomas H. Thorn Ron Schilling
			Document sealed
	AFFD	SUE	Affidavit of Sheri Wald Ron Schilling
	AFFD	SUE	Affidavit of Esther Ziemann Ron Schilling
	AFFD	SUE	Affidavit of Virginia Lee Presler Ron Schilling
			Document sealed
	AFFD	SUE	Affidavit of Michael A. Lowe Ron Schilling
	AFFD	SUE	Affidavit of Debra K. Johnson Ron Schilling



State of Idaho vs. Gene Francis Stuart

Date	Code	User	Judge
5/22/2006	AFFD	SUE	Affidavit of Rose Mary Connelly Document sealed Ron Schilling
	ADVS	SUE	Hearing result for Motion held on 05/22/2006 10:00 AM: Case Taken Under Advisement TO BE HELD AT THE MAXIMUM SECURITY PRISON IN BOISE Ron Schilling
	CMIN	SUE	Court Minutes Ron Schilling
	AFFD	SUE	Affidavit of Coby L. Smith Ron Schilling
	AFFD	SUE	Affidavit of Claudia J. Petrie Ron Schilling
	AFFD	SUE	Affidavit of Sheri Ward Ron Schilling
	AFFD	SUE	Affidavit of Doug Seeger Ron Schilling
	AFFD	SUE	Affidavit of Robert D. McDowell Ron Schilling
	AFFD	SUE	Affidavit of Esther Ziemann Ron Schilling
	AFFD	SUE	Affidavit of Michael A. Lowe Ron Schilling
	AFFD	SUE	Affidavit of Debra K. Johnson Ron Schilling
	AFFD	SUE	Affidavit pf Rose Mary Connelly Document sealed Ron Schilling
	AFFD	SUE	Affidavit of Daniel Heagy Ron Schilling
	AFFD	SUE	Affidavit of Rose Mary Connelly Document sealed Ron Schilling
	AFFD	SUE	Affidavit of Malry Jane Bigley Document sealed Ron Schilling
	AFFD	SUE	Affidavit of Gene Lee Dally Document sealed Ron Schilling
	AFFD	SUE	Affidavit of Sharie Lee Kuhl Document sealed Ron Schilling
	AFFD	SUE	Affidavit of Virginia Lee Presler Document sealed Ron Schilling
	AFFD	SUE	Affidavit of Thomas H. Thorn Document sealed Ron Schilling
	AFFD	SUE	Affidavit of Jim Bigley Document sealed Ron Schilling
	AFFD	SUE	Affidavit of Malvin W. Kraft Document sealed Ron Schilling
	AFFD	SUE	Affidavit of Delores Mary Nichols Document sealed Ron Schilling
	AFFD	SUE	Affidavit of Donna Marquette Document sealed Ron Schilling
	AFFD	SUE	Affidavit of Susan Kathleen Stuart Document sealed Ron Schilling
/18/2007	SCAN	SUE	Scanned 4/26/07 Ron Schilling
	JDMT	SUE	Judgment dismissing case with prejudice Ron Schilling
/23/2007	NOTA	SUE	NOTICE OF APPEAL Ron Schilling

State of Idaho vs. Gene Francis Stuart

Date	Code	User		Judge
4/23/2007	APSC	SUE	Appealed To The Supreme Court	Ron Schilling
	MOTN	SUE	Motion that costs of appeal be at county expense	Ron Schilling
4/30/2007	ORDR	SUE	Order	Ron Schilling
5/8/2007	MISC	SUE	Amended Notice of Appeal	Ron Schilling
6/6/2007	MISC	SUE	Second Amended Notice of Appeal	Ron Schilling
6/28/2007	STIP	SUE	Stipulation	Ron Schilling
			Document sealed	
7/2/2007	ORDR	SUE	Order	Ron Schilling
			Document sealed	
7/25/2007	NOTC	SUE	Notice of lodging reporters transcript and clerk's record	Ron Schilling
3/22/2007	AFFD	SUE	Affidavit in support of motion	Ron Schilling
	MOTN	SUE	Motion for extension of time in which to file objections to clerk's record and reporters's transcripts	Ron Schilling
	ORDR	SUE	Order	Ron Schilling
3/25/2007	NOTC	SUE	Notice of an objection to clerk's record	Ron Schilling
	NOTC	SUE	Notice of hearing In RE: Settlement of Clerk's Record	Ron Schilling
10/4/2007	HRSC	BARBIE	Hearing Scheduled (Objection 10/09/2007 10:00 AM)	Ron Schilling
12/21/2007	STIP	SUE	Stipulation regarding correction of clerk's record	Ron Schilling
1/2/2008	ORDR	SUE	Order regarding correction of clerk's record	Ron Schilling

Gene Francis Stuart, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
8/2/2002	NEWC	VICKY	New Case Filed	Ron Schilling
		VICKY	Petition For Post-conviction Relief And/or	Ron Schilling
	MISC	SUE	Writ Of Habeas Corpus	Ron Schilling
	AFFD	SUE	Affidavit In Support Of Petition	Ron Schilling
8/9/2002	CERT	SUE	Certificate Of Delivery	Ron Schilling
8/30/2002	AFFD	SUE	Affidavit In Support Of Motion	Ron Schilling
	MOTN	SUE	Motion For Summary Dismissal	Ron Schilling
	BRIE	SUE	Brief In Sup. Of Motion For Summary Dismissal	Ron Schilling
9/3/2002	CERT	SUE	Certificate Of Mailing	Ron Schilling
9/9/2002	NOTC	SUE	Notice Of Intent To File Opposition And	Ron Schilling
	MISC	SUE	Supporting Memorandum & Req. Hearing	Ron Schilling
2/5/2003	MOTN	SUE	Motion For Limited Admission	Ron Schilling
3/6/2003	RESP	SUE	Petitioner's Response In Opp. To Mot. For	Ron Schilling
	MISC	SUE	Summary Dismissal Of Petition	Ron Schilling
3/24/2003	HRSC	VICKY	Hearing Scheduled - (04/09/2003) Ron Schilling	Ron Schilling
4/9/2003	INHD	VICKY	Interim Hearing Held	Ron Schilling
	ORDR	VICKY	Order Granting Limited Appearance And Waiver	Ron Schilling
	CMIN	VICKY	Court Minutes	Ron Schilling
4/10/2003	MISC	VICKY	Supplemental Authority Supporting Petition	Ron Schilling
	MISC	VICKY	For Post-conviction Relief And/or Writ H.c.	Ron Schilling
5/12/2003	ORDR	VICKY	Briefing Order	Ron Schilling
5/13/2003	PETN	SUE	Petition For Appt. Of Special Prosecutor	Ron Schilling
5/14/2003	MISC	SUE	Amended Petition For Appt. Of Special Pros.	Ron Schilling
5/24/2003	ORDR	SUE	Order To Appoint Special Prosecutor In Re	Ron Schilling
	MISC	SUE	Post Conviction Relief And/or Habeas Corpus	Ron Schilling
	CERT	SUE	Certificate Of Mailing	Ron Schilling
6/10/2003	AFFD	VICKY	Affidavit In Support Of Motion For Extension	Ron Schilling
	AFFD	VICKY	Of Time	Ron Schilling
	MOTN	VICKY	Motion For Extension Of Time	Ron Schilling
7/14/2003	BRIE	VICKY	Reply Brief In Support Of State's Motion For	Ron Schilling
	BRIE	VICKY	Summary Dismissal	Ron Schilling
7/26/2004	HRSC	SUE	Hearing Scheduled - (03/03/2004) Ron Schilling	Ron Schilling
7/2/2004	AFFD	SUE	Affd. In Support Of Mot. To Stay Proceedings	Ron Schilling
	MISC	SUE	Pending Dispo. In The Idaho Supreme Ct.	Ron Schilling
	MOTN	SUE	Mot. To Stay Proceedings Pending Disposition	Ron Schilling
7/3/2004	INHD	SUE	Interim Hearing Held	Ron Schilling
	CMIN	SUE	Court Minutes	Ron Schilling

Case: CV-2002-0000443 Current Judge: Ron Schilling  
Gene Francis Stuart, Plaintiff vs State Of Idaho, Defendant

Gene Francis Stuart, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
3/3/2004	RMK9	SUE	Stay Pending Supreme Court Decision	Ron Schilling
3/17/2004	ORDR	SUE	Order Staying Proceedings Pending Disposition in the Idaho Supreme Court	Ron Schilling
12/23/2005	HRSC	SUE	Hearing Scheduled (Telephonic Status Conference 01/06/2006 10:00 AM)	Ron Schilling
		SUE	Notice Of Hearing	Ron Schilling
	PROS	SUE	Prosecutor assigned Lori Gilmore	Ron Schilling
12/27/2005	MOTN	SUE	Motion to lift stay	Ron Schilling
1/6/2006	HRHD	SUE	Hearing result for Telephonic Status Conference held on 01/06/2006 10:00 AM: Hearing Held	Ron Schilling
	CMIN	SUE	Court Minutes	Ron Schilling
	HRSC	SUE	Hearing Scheduled (Telephonic Scheduling Conference 03/30/2006 10:00 AM)	Ron Schilling
		SUE	Notice Of Hearing	Ron Schilling
2/10/2006	BRIE	SUE	Petitioner's supplemental briefing in opposition to 1) motion for summary dismissal of petition for postconviction relief and/or writ of habeas corpus & 2) Rule 35 petition	Ron Schilling
3/10/2006	BREF	SHARON	Supplemental Brief in Support of Respondent's Motion For Summary Dismissal	Ron Schilling
3/30/2006	HRHD	SUE	Hearing result for Telephonic Scheduling Conference held on 03/30/2006 10:00 AM: Hearing Held	Ron Schilling
	CMIN	SUE	Court Minutes	Ron Schilling
	HRSC	SUE	Hearing Scheduled (Hearing Scheduled 05/22/2006 10:00 AM) To be held at the maximum security prison in Boise	Ron Schilling
5/22/2006	AFFD	SUE	Affidavit of Susan Kathleen Stuart	Ron Schilling
			Document sealed	
	AFFD	SUE	Affidavit of Jim Bigley	Ron Schilling
			Document sealed	
	AFFD	SUE	Affidavit of Mary Jane Bigley	Ron Schilling
			Document sealed	
	AFFD	SUE	Affidavit of Gene Lee Dally	Ron Schilling
			Document sealed	
	AFFD	SUE	Affidavit of Daniel Heagy	Ron Schilling
	AFFD	SUE	Affidavit of Malvin W. Kraft	Ron Schilling
			Document sealed	
	AFFD	SUE	Affidavit of Sharie Lee Kuhl	Ron Schilling
			Document sealed	
	AFFD	SUE	Affidavit of Robert Daniel McDowell	Ron Schilling
	AFFD	SUE	Affidavit of Donna Marguette	Ron Schilling
			Document sealed	

Gene Francis Stuart, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
5/22/2006	AFFD	SUE	Affidavit of Delores Mary Nichols	Ron Schilling
			Document sealed	
	AFFD	SUE	Affidavit of Claudia J. Petrie	Ron Schilling
	AFFD	SUE	Affidavit of Doug Seeger	Ron Schilling
	AFFD	SUE	Affidavit of Coby L. Smith	Ron Schilling
	AFFD	SUE	Affidavit of Thomas H. Thorn	Ron Schilling
			Document sealed	
	AFFD	SUE	Affidavit of Sheri Ward	Ron Schilling
	AFFD	SUE	Affidavit of Esther Ziemann	Ron Schilling
	AFFD	SUE	Affidavit of Virginia Lee Presler	Ron Schilling
			Document sealed	
	AFFD	SUE	Affidavit of Michael A. Lowe	Ron Schilling
	AFFD	SUE	Affidavit of Debra K. Johnson	Ron Schilling
	AFFD	SUE	Affidavit of Rose Mary Connelly	Ron Schilling
			Document sealed	
	ADVS	SUE	Hearing result for Hearing Scheduled held on 05/22/2006 10:00 AM: Case Taken Under Advisement To be held at the maximum security prison in Boise	Ron Schilling
	CMIN	SUE	Court Minutes	Ron Schilling
3/12/2007	CDIS	SUE	Civil Disposition entered for: Gilmore, Lori, Other Party; State Of Idaho, Other Party; Stuart, Gene Francis, Subject. order date: 3/12/2007	Ron Schilling
	MEMO	SUE	Memorandum Opinion on Petition for Post Conviction Relief and/or Writ of Habeas Corpus & Motion to Correct Illegal Sentence, to vacate sentence of death and for new sentencing trial.	Ron Schilling
	SCAN	SUE	Scanned 03/29/07	Ron Schilling
1/18/2007	JDMT	SUE	Judgment Dismissing Case with Prejudice	Ron Schilling
	SCAN	SUE	Scanned 04/26/2007	Ron Schilling
1/23/2007	APSC	SUE	Appealed To The Supreme Court	Ron Schilling
	NOTA	SUE	NOTICE OF APPEAL	Ron Schilling
	MOTN	SUE	Motion that costs of appeal be at county expense	Ron Schilling
1/30/2007	ORDR	SUE	Order	Ron Schilling
1/8/2007	MISC	SUE	Amended Notice of Appeal	Ron Schilling
1/6/2007	MISC	SUE	Second Amended Notice of Appeal	Ron Schilling
1/28/2007	STIP	SUE	Stipulation	Ron Schilling
			Document sealed	
1/2/2007	ORDR	SUE	Order	Ron Schilling
			Document sealed	
1/25/2007	NOTC	SUE	Notice of lodging reporters transcript and clerk's record	Ron Schilling

Date: 1/18/2008

Second Judicial District Court - Clearwater County

User: SUE

Time: 02:02 PM

ROA Report

Page 4 of 4

Case: CV-2002-0000443 Current Judge: Ron Schilling

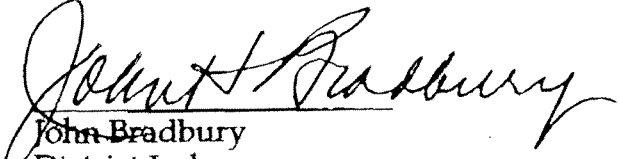
Gene Francis Stuart, Plaintiff vs State Of Idaho, Defendant

Gene Francis Stuart, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
8/22/2007	AFFD	SUE	Affidavit in support of motion for extension	Ron Schilling
	MOTN	SUE	Motion for extension of time in which to file objections to clerk's record and reporter's transcript	Ron Schilling
	ORDR	SUE	Order	Ron Schilling
9/25/2007	NOTC	SUE	Notice of hearing In RE: Settlement of Clerk's Record	Ron Schilling
	NOTC	SUE	Notice of and objection to clerk's record	Ron Schilling
10/4/2007	HRSC	BARBIE	Hearing Scheduled (Objection 10/09/2007 10:00 AM)	Ron Schilling
12/21/2007	STIP	SUE	Stipulation regarding correction of clerk's record	Ron Schilling
1/2/2008	ORDR	SUE	Order regarding correction of clerk's record	Ron Schilling

3. Porter's Motion to Correct Illegal Sentence, to Vacate Sentence of Death and for New Sentencing Trial (Lewis County Case No. 6053) is denied without prejudice as moot;<sup>3</sup>
4. The Verdict, filed January 26, 1990, finding Porter guilty of first-degree murder shall stand;
5. The district court's order and judgment that Porter is "guilty of the CRIME OF MURDER IN THE FIRST DEGREE as charged in said information as found by the jury in their unanimous verdict" contained in the Judgment and Sentence, filed September 7, 1990 shall stand;
6. The district court's order, judgment and decree that Porter is "sentenced to suffer the punishment of death in accordance with the provisions of Idaho Code Section 18-4004 and in the manner prescribed by Chapter 27 of Title 19, Idaho Code, at the Idaho State Penitentiary in Boise, Ada County, Idaho" contained in the Judgment and Sentence, filed September 7, 1990 is hereby vacated;
7. A new date will be set to sentence Porter for first-degree murder, the only crime of which he now stands convicted by a jury of his peers.

IT IS SO ORDERED this 2 day of April, 2003.

  
John Bradbury  
District Judge

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<sup>3</sup> Although I have serious reservations about this court's jurisdiction to impose the death penalty in this case, *Hays v. State*, 113 Idaho 736, 739, 747 P.2d 758 (Ct.App. 1987) ("A jurisdictional defect exists when the alleged facts are not made criminal by statute, or where there is a failure to state facts essential to establish the offense charged"), because I conclude I.C. § 19-2719 does not bar Porter's petition for relief, I do not reach those issues raised by his Rule 35 motion.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above Memorandum Decision was delivered to the following persons by the manner indicated.

L. LaMont Anderson  
Office of the Attorney General  
Capital Litigation Unit  
P.O. Box 83720  
Boise, Idaho 83720-0010

☒ U.S. Mail  
☐ Overnight Mail  
☐ Fax  
☐ Hand Delivery

Kimron R. Torgerson  
Prosecuting Attorney  
Lewis County Courthouse  
Nezperce, Idaho 83543

☐ U.S. Mail  
☐ Overnight Mail  
☐ Fax  
☒ Hand Delivery

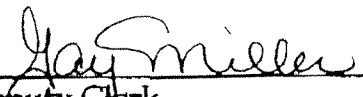
Andrew Parnes  
P.O. Box 5988  
Ketchum, ID 83340

☒ U.S. Mail  
☐ Overnight Mail  
☐ Fax  
☐ Hand Delivery

Joan Fisher  
Bruce Livingston  
Capital Habeas Unit  
Federal Defenders of Eastern Washington & Idaho  
201 N. Main Street  
Moscow, Idaho 83843

☒ U.S. Mail  
☐ Overnight Mail  
☒ Fax 208-883-1472  
☐ Hand Delivery

Dated this 30<sup>th</sup> day of April, 2003

  
Deputy Clerk



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

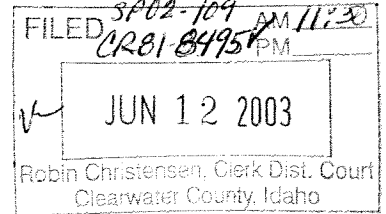
STATE OF IDAHO, )  
Plaintiff, )

vs. )

GENE FRANCIS STUART, )  
Defendant. )

CASE NO. CR81-<sup>8495</sup>~~8945~~

BRIEFING ORDER



GENE FRANCIS STUART, )  
Petitioner, )

vs. )

CASE NO. SP02-00109

STATE OF IDAHO, )  
Respondent. )

BRIEFING ORDER

GENE FRANCIS STUART, )  
Petitioner, )

vs. )

CASE NO. SP02-00151

STATE OF IDAHO, )  
Respondent. )

BRIEFING ORDER

Following a conference call on April 9, 2003, at the hour of 10:15 a.m., the  
Court hereby sets the following cut-off dates:

Defendant/Petitioner shall file its responsive brief to the Motion for Summary  
Dismissal in SP02-151 by July 11, 2003;

Plaintiff/Respondent shall file all responsive briefs to Defendant/Petitioner's  
pending briefs on or before October 10, 2003;

Defendant/Petitioner shall file response to Plaintiff/Respondent's briefs by  
November 14, 2003.

Upon completion of briefing a hearing will be scheduled at the Maximum Security Facility courtroom in Boise, Idaho. Defendant/Petitioner, Gene Francis Stuart, will be personally present at said hearing.

Any preliminary matters not needing court minutes may be set up as a conference call. Any preliminary matters requiring court minutes will be scheduled for hearing at the Clearwater County Courthouse, Orofino, Idaho.

DATED this 10<sup>th</sup> day of ~~April~~ <sup>June</sup>, 2003.

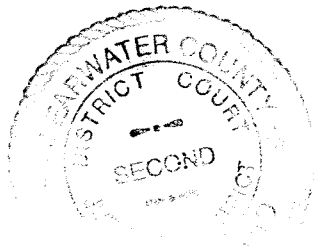
  
RON SCHILLING  
Presiding Judge

#### CERTIFICATE OF DELIVERY


I hereby certify that a true and correct copy of the foregoing BRIEFING ORDER was hand delivered or mailed, postage pre-paid, on the 13<sup>th</sup> day of April, 2003 to the following:

John A. Swayne  
Prosecuting Attorney  
Clearwater County Courthouse  
✓ hand delivered

Joan M. Fisher  
Oliver W. Loewy  
Capital Habeas Unit  
201 North Main Street  
Moscow, ID 83843  
✓ mailed



ROBIN CHRISTENSEN  
Clerk of the District Court

By   
Deputy Clerk

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

MICHAEL A. HENDERSON  
Deputy Attorney General  
Chief, Criminal Law Division

L. LaMONT ANDERSON, ISB # 3687  
KIMBERLY J. BAILEY, ISB #5159  
RALPH R. BLOUNT, ISB #5966  
Deputy Attorneys General  
Criminal Law Division  
Capital Litigation Unit  
P.O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2400  
Facsimile: (208) 334-2942

JOHN A. SWAYNE, ISB #1985  
Prosecuting Attorney  
County of Clearwater  
PO Box 2627  
Orofino, ID 83544  
Telephone: (208) 476-5611  
Facsimile: (208) 476-9710

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

✓ 2003 AUG 13 A 11:39

CASE NO. SP02-109

BY P DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR CLEARWATER COUNTY

STATE OF IDAHO, )  
)  
Plaintiff-Appellant, )  
)  
vs. )  
)  
GENE FRANCIS STEWART, )  
)  
Petitioner-Respondent. )  
\_\_\_\_\_ )

CASE NO. SP02-00109

PETITION FOR APPOINTMENT OF  
SPECIAL PROSECUTOR IN RE POST  
CONVICTION RELIEF AND/OR  
WRIT OF HABEAS CORPUS

PETITION FOR APPOINTMENT OF SPECIAL PROSECUTOR IN RE POST CONVICTION RELIEF  
AND/OR WRIT OF HABEAS CORPUS - 1

00000205

COMES NOW, John A. Swayne, Prosecuting Attorney, in and for Clearwater County, State of Idaho, and hereby petitions the above-entitled court for the appointment of a Special Prosecutor in the interest of GENE FRANCIS STEWART and upon being duly sworn, hereby deposes and says:

1. That your affiant is the duly elected Prosecuting Attorney of Clearwater County;

2. That your affiant has the duty to respond to the Petition For Post-Conviction Relief and/or Writ of Habeas Corpus filed on behalf of GENE FRANCIS STEWART pursuant to Idaho Code §§ 19-2719 and 19-4902;

3. That the Petition For Post-Conviction Relief and/or Writ of Habeas Corpus filed on behalf of GENE FRANCIS STEWART in the above entitled cases involves both complex and technical legal issues involving the sentencing of GENE FRANCIS STEWART to the death penalty for the crime of Murder in the First Degree,;

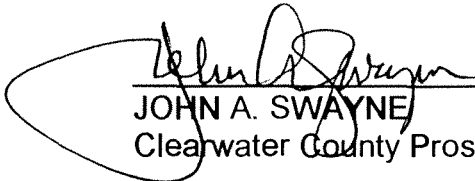
4. That Idaho Attorney General Lawrence G. Wasden, or his designee, is the attorney presently assigned in the Petitioner's criminal Case No. SP02-00151 and has represented Clearwater County as a Special Prosecutor in other Post Conviction petitions regarding this same defendant and accordingly is familiar with the ongoing issues and court proceedings involving this case at both the state and federal appellate levels; that this case number should have been included in the Petition for Appointment of Special Counsel filed earlier this year, which petition the Court has granted.

5. That your affiant believes that because the above-named Petitioner has previously exhausted his Idaho appellate remedies and has had his Petition for Writ of

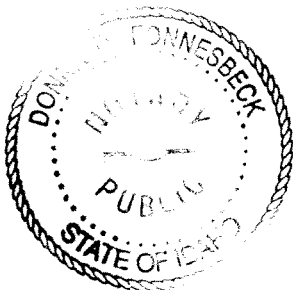
Certiorari denied by the United States Supreme Court and has had his Third Petition For Post Conviction Relief dismissed, the response to the pending Petition For Post-Conviction Relief and/or Writ of Habeas Corpus requires the continuing assistance of the Capital Litigation Unit and the Idaho Attorney General's Office in order to provide for the necessary continuity and expertise in the above-captioned case;


6. That your affiant petitions this Court to appoint Idaho Attorney General Lawrence G. Wasden, or his designee, a member of the Idaho State Bar Association and experienced attorney in criminal prosecution, as the Special Prosecutor pursuant to Idaho Code §31-2603(b), in that he is a suitable person to perform the duties required of your affiant and to assist the Clearwater County Prosecutor in responding to the Petition For Post-Conviction Relief and/or Writ of Habeas Corpus filed on behalf of GENE FRANCIS STEWART.

DATED this 13 day of August, 2003.

  
JOHN A. SWAYNE  
Clearwater County Prosecuting Attorney

SUBSCRIBED AND SWORN To before me this 13<sup>th</sup> day of Aug., 2003.



  
NOTARY PUBLIC FOR IDAHO  
Residing at Orofino, therein  
Commission expires 6-16-06

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

MICHAEL A. HENDERSON  
Deputy Attorney General  
Chief, Criminal Law Division

L. LaMONT ANDERSON, ISB # 3687  
KIMBERLY J. BAILEY, ISB #5159  
RALPH R. BLOUNT, ISB #5966  
Deputy Attorneys General  
Criminal Law Division  
Capital Litigation Unit  
P.O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2400  
Facsimile: (208) 334-2942

JOHN A. SWAYNE, ISB #1985  
Prosecuting Attorney  
County of Clearwater  
PO Box 2627  
Orofino, ID 83544  
Telephone: (208) 476-5611  
Facsimile: (208) 476-9710

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2003 AUG 14 A 8:47

CASE NO. SP02-00109

BY SC DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR CLEARWATER COUNTY

STATE OF IDAHO,	)	
	)	CASE NO. SP02-00109
Plaintiff-Appellant,	)	
	)	AMENDED
vs.	)	PETITION FOR APPOINTMENT OF
	)	SPECIAL PROSECUTOR IN RE POST
GENE FRANCIS STUART,	)	CONVICTION RELIEF AND/OR
	)	WRIT OF HABEAS CORPUS
Petitioner-Respondent.	)	
_____	)	

COMES NOW, John A. Swayne, Prosecuting Attorney, in and for Clearwater County, State of Idaho, and hereby petitions the above-entitled court for the appointment of a Special Prosecutor in the interest of GENE FRANCIS STUART and upon being duly sworn, hereby deposes and says:

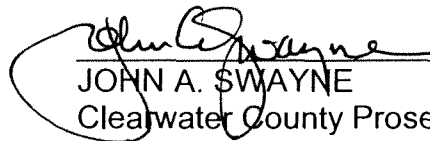
1. That your affiant is the duly elected Prosecuting Attorney of Clearwater County;
2. That your affiant has the duty to respond to the Petition For Post-Conviction Relief and/or Writ of Habeas Corpus filed on behalf of GENE FRANCIS STUART pursuant to Idaho Code §§ 19-2719 and 19-4902;
3. That the Petition For Post-Conviction Relief and/or Writ of Habeas Corpus filed on behalf of GENE FRANCIS STUART in the above entitled cases involves both complex and technical legal issues involving the sentencing of GENE FRANCIS STUART to the death penalty for the crime of Murder in the First Degree,;
4. That Idaho Attorney General Lawrence G. Wasden, or his designee, is the attorney presently assigned in the Petitioner's criminal Case No. SP02-00151 and has represented Clearwater County as a Special Prosecutor in other Post Conviction petitions regarding this same defendant and accordingly is familiar with the ongoing issues and court proceedings involving this case at both the state and federal appellate levels; that this case number should have been included in the Petition for Appointment of Special Counsel filed earlier this year, which petition the Court has granted.

5. That your affiant believes that because the above-named Petitioner has previously exhausted his Idaho appellate remedies and has had his Petition for Writ of Certiorari denied by the United States Supreme Court and has had his Third Petition For

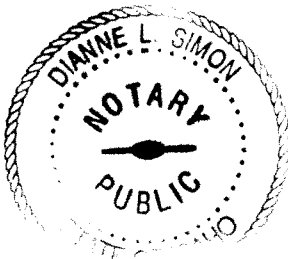
Post Conviction Relief dismissed, the response to the pending Petition For Post-Conviction Relief and/or Writ of Habeas Corpus requires the continuing assistance of the Capital Litigation Unit and the Idaho Attorney General's Office in order to provide for the necessary continuity and expertise in the above-captioned case;

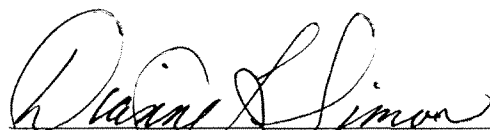
6. That your affiant petitions this Court to appoint Idaho Attorney General Lawrence G. Wasden, or his designee, a member of the Idaho State Bar Association and experienced attorney in criminal prosecution, as the Special Prosecutor pursuant to Idaho Code §31-2603(b), in that he is a suitable person to perform the duties required of your affiant and to assist the Clearwater County Prosecutor in responding to the Petition For Post-Conviction Relief and/or Writ of Habeas Corpus filed on behalf of GENE FRANCIS STUART.

DATED this 14 day of Aug, 2003.

  
JOHN A. SWAYNE  
Clearwater County Prosecuting Attorney

SUBSCRIBED AND SWORN To before me this 14 day of August, 2003.



  
NOTARY PUBLIC FOR IDAHO  
Residing at Orofino, therein  
Commission expires 6/20/2006



FILED September 3 2003  
9:38 AM  
CLB  
CLERK, LEWISTON, IDAHO

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

GENE FRANCIS STUART,	)	
	)	Case No.: 8495
Petitioner-Appellant,	)	
	)	ORDER FOR ATTORNEY'S FEES
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
_____	)	

IT IS HEREBY ORDERED that the fees in this matter in the amount of **\$650.00** at the rate of \$100.00 per hour be and the same hereby are approved and payable to Randall, Blake & Cox, P.A.

DATED THIS 3<sup>rd</sup> day of September, 2003.

  
DISTRICT JUDGE

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

MICHAEL A. HENDERSON  
Deputy Attorney General  
Chief, Criminal Law Division

L. LaMONT ANDERSON, ISB # 3687  
KIMBERLY J. BAILEY, ISB #5159  
RALPH R. BLOUNT, ISB #5966  
Deputy Attorneys General  
Criminal Law Division  
Capital Litigation Unit  
P.O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2400  
Facsimile: (208) 334-2942

JOHN A. SWAYNE, ISB #1985  
Prosecuting Attorney  
Clearwater County Courthouse  
P.O. Box 2627  
Orofino, ID 83544  
Telephone: (208) 476-5611  
Facsimile: (208) 476-9710

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2003 SEP 24 P 1:05

CASE NO. CLC81-008495

BY SHS DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR CLEARWATER COUNTY

STATE OF IDAHO,	)	
	)	
Plaintiff-Appellee,	)	CASE NO. 8495
	)	
vs.	)	AMENDED ORDER TO APPOINT
	)	SPECIAL PROSECUTOR RE: MOTION
	)	TO RECALL REMITTITUR
	)	AND REMAND FOR RESENTENCING
GENE FRANCIS STUART,	)	PROCEDURES
	)	
Appellant	)	
_____	)	

IT IS HEREBY ORDERED, AND THIS DOES ORDER, that Idaho Attorney

General Lawrence G. Wasden, or his designee, State of Idaho, be appointed as Special Prosecutor to assist the Clearwater County Prosecuting Attorney in Clearwater County Case No. 8495, STATE of IDAHO vs. GENE FRANCIS STUART, Idaho Attorney General Lawrence G. Wasden, or his designee, would be a suitable person to perform the duties required in this matter and that good cause exists to appoint the Attorney General or his designee, as Special Prosecutor to assist in the response to the Motion to Recall the Remittitur and Remand for Resentencing Procedures filed on behalf of GENE FRANCIS STUART in the above entitled case.

Dated this 22<sup>nd</sup> day of September, 2003.

  
Judge

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

MICHAEL A. HENDERSON  
Deputy Attorney General  
Chief, Criminal Law Division

L. LaMONT ANDERSON, ISB # 3687  
KIMBERLY J. BAILEY, ISB #5159  
RALPH R. BLOUNT, ISB #5966  
Deputy Attorneys General  
Criminal Law Division  
Capital Litigation Unit  
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Telephone: (208) 334-2400  
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JOHN A. SWAYNE, ISB #1985  
Prosecuting Attorney  
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P.O. Box 2627  
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Facsimile: (208) 476-9710

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2003 SEP 24 P 1:05

CASE NO. SP02-00109

BY SKS DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR CLEARWATER COUNTY

STATE OF IDAHO,	)	
	)	
Plaintiff-Appellant,	)	CASE NO. SP02-00109
	)	
vs.	)	ORDER TO APPOINT SPECIAL
	)	PROSECUTOR IN RE POST
GENE FRANCIS STUART,	)	CONVICTION RELIEF AND/OR
	)	WRIT OF HABEAS CORPUS
Petitioner-Respondent.	)	
	)	


IT IS HEREBY ORDERED, AND THIS DOES ORDER, that Idaho Attorney

ORDER TO APPOINT SPECIAL PROSECUTOR IN RE POST-CONVICTION RELIEF AND/OR  
WRIT OF HABEAS CORPUS - 1

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General Lawrence G. Wasden, or his designee, State of Idaho, be appointed as special prosecutor in the matter of the PETITION FOR POST-CONVICTION RELIEF AND/OR WRIT OF HABEAS CORPUS, GENE FRANCIS STUART vs. State of Idaho, to assist the Clearwater County Prosecuting Attorney, in that Idaho Attorney General Lawrence G. Wasden, or his designee, is a suitable person to perform the duties required in this matter and that good cause exists to appoint a special prosecutor to assist in the response to the Petition for Post-Conviction Relief and/or Writ of Habeas Corpus, filed on behalf of GENE FRANCIS STUART.

Dated this 22<sup>nd</sup> day of September, 2003.

  
Judge

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2003 SEP 24 P 1:26

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE  
OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

CASE NO. SP02-00109  
BY Sue K. Summerton DEPUTY

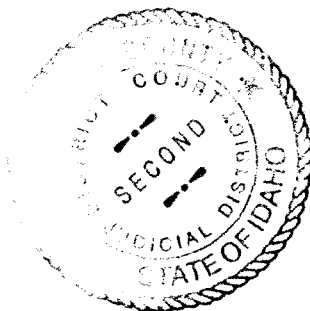
GENE FRANCIS STUART, ) CASE NO. SP02-00109  
 )  
Petitioner, ) CERTIFICATE OF MAILING  
 )  
vs. )  
 )  
STATE OF IDAHO, )  
 )  
Respondent. )

I, Sue K. Summerton, Deputy Clerk of the above entitled Court, hereby certify that a true and correct copy of the ORDER TO APPOINT SPECIAL PROSECUTOR IN RE POST CONVICTION RELIEF AND/OR WRIT OF HABEAS CORPUS was mailed, postage prepaid, this 24<sup>th</sup> day of September, 2003, to the following:

John A. Swayne, Clearwater County Prosecutor, Courthouse Mail, Orofino, ID 83544

L. LaMont Anderson, Office of Attorney General, P.O. Box 83720, Boise, ID 83720

Joan Fisher and Oliver W. Loewy, Capital Habeas Unit, 201 North Main Street, Moscow, ID 83843



ROBIN CHRISTENSEN, Clerk

By: Sue K. Summerton  
Deputy

CERTIFICATE OF MAILING

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ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO  
V

2003 SEP 24 P 1:26

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE  
OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER ~~CR 81-8495~~

STATE OF IDAHO,	)	CASE NO. CR81-8495 <del>SKS</del> DEPUTY
	)	
Plaintiff/Appellee,	)	CERTIFICATE OF MAILING
	)	
vs.	)	
	)	
GENE FRANCIS STUART,	)	
	)	
Appellant.	)	

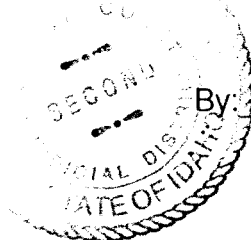
I, Sue K. Summerton, Deputy Clerk of the above entitled Court, hereby certify that a true and correct copy of the AMENDED ORDER TO APPOINT SPECIAL PROSECUTOR RE: MOTION TO RECALL REMITTITUR AND REMAND FOR RESENTINCING PROCEDURES was mailed, postage prepaid, this 24<sup>th</sup> day of September, 2003, to the following:

John A. Swayne, Clearwater County Prosecutor, Courthouse Mail, Orofino, ID 83544

L. LaMont Anderson, Office of Attorney General, P.O. Box 83720, Boise, ID 83720

Joan Fisher and Oliver W. Loewy, Capital Habeas Unit, 201 North Main Street, Moscow, ID 83843

ROBIN CHRISTENSEN, Clerk



By: Sue K. Summerton

Deputy

CERTIFICATE OF MAILING

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LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

MICHAEL A. HENDERSON  
Deputy Attorney General  
Chief, Criminal Law Division

L. LaMONT ANDERSON, ISB # 3687  
RALPH R. BLOUNT, ISB #5966  
KRISTINA M. SCHINDELE, ISB #6090  
Deputy Attorneys General  
Criminal Law Division, Capital Litigation Unit  
P.O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2400

JOHN SWAYNE, ISB #1985  
Clearwater County Prosecuting Attorney  
Box 2627  
Orofino, ID 83544  
Telephone: (208) 476-5611

FILED  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
NOV 14 2003

2003 NOV 14 P 2:50

SP02-109  
CASE NO. CR01-8495

BY VL DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

GENE FRANCIS STUART,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

and

STATE OF IDAHO,

Plaintiff,

vs.

GENE FRANCIS STUART,

Defendant.

CASE NO. SP-02-00109

REPLY BRIEF IN SUPPORT OF STATE'S  
MOTION FOR SUMMARY DISMISSAL

CASE NO. 8495

REPLY BRIEF IN SUPPORT OF STATE'S  
MOTION FOR SUMMARY DISMISSAL



COME NOW, L. LaMont Anderson, Deputy Attorney General, Chief, Capital Litigation Unit and Special Prosecuting Attorney for Clearwater County, State of Idaho, and John A. Swayne, Prosecuting Attorney for Clearwater County, State of Idaho, and do hereby submit this reply brief in support of the state's Motion for Summary Dismissal.

### ARGUMENT

A. Because Stuart Was Convicted Of First-Degree Murder Making Him Eligible For The Death Penalty, His Successive Petition For Post-Conviction Relief Is Governed By I.C. § 19-2719

Stuart's contention that he was never convicted of capital first-degree murder is without merit. (Resp. in Opp., pp.5-6.) Stuart was clearly convicted of first-degree murder. (#14863, R., p.70.) Based upon his first-degree murder conviction, Stuart was eligible for the death penalty, *see* I.C. § 18-4004, which was properly imposed by the district court and affirmed by the Idaho Supreme Court. *See State v. Stuart*, 110 Idaho 163, 715 P.2d 833 (1986) (Stuart I).

Further, Stuart's contention has been expressly rejected by at least one of Idaho's sister states. In *State v. Mata*, 668 N.W.2d 448, 480 (Neb. 2003), the defendant contended that under *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (Scalia, J.), he had only been convicted of the "lesser offense" of first-degree murder and could not be resentenced to the "greater offense" of capital murder. Rejecting the defendant's argument, the Nebraska Supreme Court first noted that only three Justices agreed with the relevant portion of *Sattazahn*. Addressing the merits of the defendant's argument, the court explained:

Mata stands convicted of capital murder as defined by the *Sattazahn* plurality, but error in the sentencing proceeding resulted in reversible error of the sentencing portion of Mata's final judgment. However, Mata can be

resentenced, because he has not been “acquitted” of capital murder as defined by the *Sattazahn* plurality. There is no support in *Ring* or the *Sattazahn* plurality discussion for the proposition that a separate capital resentencing proceeding following a successful appeal violates the Sixth Amendment or the Double Jeopardy Clause.

Mata, 668 N.W.2d at 480.

Likewise, the Idaho Supreme Court has implicitly concluded that Sattazahn does not preclude the state from seeking another death sentence when a prior death sentence has been reversed as a result of the dictates of Ring v. Arizona, 536 U.S. 584 (2002). In State v. Lovelace, 2003 WL 21697869, \*10-11 (Idaho 2003), *pets. for reh'g pending*, the Idaho Supreme Court concluded a capital defendant required resentencing because of the dictates of Ring. The court specifically addressed Sattazahn in addressing the question of whether resentencing Lovelace to death would violate the Double Jeopardy Clause:

The fact finder in Lovelace's case made those findings necessary to impose a death sentence, which was the sentence he received at his original trial. In no sense has a fact finder concluded that the State failed to prove aggravating circumstances beyond a reasonable doubt. On resentencing, then, Lovelace will not face sentencing on a charge of which he had been previously "acquitted" for double jeopardy purposes. Jeopardy did not attach and double jeopardy [would] not bar [a] subsequent death sentence.

• • • •

A capital defendant whose original sentence is vacated on appeal can be resentenced to death so long as the defendant has not been “acquitted” of the death sentence.

*Id.* at 12-13.

Clearly, Stuart has never been “acquitted” of a death sentence. The Idaho Supreme Court affirmed the district court’s finding of two statutory aggravating factors, including: (1) “The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity;” and (2) “The defendant by prior conduct or conduct in the

commission of the murder at hand has exhibited a propensity to commit murder which will probably constitute a continuing threat to society." Stuart I, 110 Idaho at 174-75. Unless this court decides that no rational trier of fact could have found the essential elements of at least one statutory aggravating factor beyond a reasonable doubt, State v. Fields, 115 Idaho 1101, 1103, 772 P.2d 739 (1989), Stuart has not been acquitted of the death penalty. Obviously, if Stuart can be resentenced to death under the dictates of Lovelace, he was first convicted of "capital murder" and his successive petition is governed by I.C. § 19-2719

B. Because I.C. § 19-2719 Does Not Provide For The Retroactive Application Of New Rules Of Law In A Successive Post-Conviction Petition, Stuart Has Failed To Meet The Requisite *Prima Facie* Showing For Relief

Spending a significant portion of his Response in Opposition to Motion for Summary Dismissal addressing the applicability of I.C. § 19-2719(5)(c), Stuart has apparently concluded that the state's argument regarding the retroactive application of Ring is based exclusively upon I.C. § 19-2719(5)(c). (Resp. in Opp., pp.9-37.) However, Stuart is mistaken as to the state's position regarding retroactivity. As detailed in the state's Brief in Support of Motion for Summary Dismissal, I.C. § 19-2719(5)(c) certainly provides additional authority to dismiss Stuart's post-conviction claims. (Brief in Support, pp.9-10.) However, as also explained in the state's Brief in Support of Motion for Summary Dismissal, the Idaho Supreme Court's holding in Fetterly v. State, 121 Idaho 417, 418, 825 P.2d 1073 (1991), and Stuart v. State, 128 Idaho 436, 437-38, 914 P.2d 933 (1996) (Stuart V), independently supports the state's position. (Brief in Support, pp.8-9.) Clearly, the underlying premise of Fetterly and Stuart V, is that I.C. § 19-2719 does not contain a provision permitting the filing of a successive post-conviction

claim based upon the retroactive application of new rules of law. Rather, the **only exception** is provided in I.C. § 19-2719(5), which permits a successive petition “in those unusual cases where it can be demonstrated that the issues raised were not known and reasonably could not have been known within the time frame allowed by the statute.” Creech v. State, 137 Idaho 573, 575, 51 P.3d 387 (2002).

C. Having Been Implicitly Rejected By The Idaho Supreme Court's Analysis Of I.C. § 19-2719 And By Other Courts, Stuart's Challenges Regarding I.C. § 19-2719(5)(c) Are Without Merit

1. Because *Ring* Is A New Rule Of Law, It Cannot Be Applied Retroactively To Stuart's Case

Stuart contends I.C. § 19-2719(5)(c) has no application to his case because “*Ring* did not announce a new rule of law.” (Resp. in Opp., p.10.) Stuart’s attempt to claim that the United States Supreme Court’s decision in Ring, is not a new rule of law is akin to saying white paper is black. Stuart’s successive petition itself underscores the obvious fact that Ring established a new rule of law by stating, “The decision in *Ring* is thus a truly extraordinary legal development which compels this Court’s reconsideration of the constitutionality of Petitioner’s death sentence.” (Petition, p.4.) The obvious “extraordinary legal development” is the announcement of a new rule of law that had been expressly rejected by the United States Supreme Court just twelve years earlier in Walton v. Arizona, 497 U.S. 639 (1990).

Even the Ninth Circuit has recognized that Ring is a new rule of law, not merely an application of long settled law, because ““there can be no dispute that a decision announces a new rule of law if it expressly overrules a prior decision.”” Summerlin v. Stewart, 341 F.3d 1082, 1109 (9<sup>th</sup> Cir. 2003), *pet. for cert. pending*, (quoting Graham v.

Collins, 506 U.S. 461, 467 (1993)). Because Ring expressly announced it was overruling Walton, there is no question it announces a new rule of law.

2. Stuart Has Failed To Establish I.C. § 19-2719(5)(c) Violates Constitutional Or State Laws

a. Idaho Code § 19-2719(5)(c) Does Not Violate Idaho's Separation Of Powers Doctrine

Stuart contends I.C. § 19-2719(5)(c) violates Idaho's separation of powers doctrine under the Idaho Constitution, art. II, § 1. (Resp. in Opp., pp.21-23.) While Idaho's appellate courts have not directly addressed this issue, it has been addressed in the context of habeas corpus. In Mahaffey v. State, 87 Idaho 228, 280, 392 P.2d 279 (1964), the Idaho Supreme Court explained that, because the writ of habeas corpus is expressly recognized in Idaho's constitution, "the writ is not a statutory remedy." The court concluded, "While the legislature (absent certain contingencies) is without power to abridge this remedy secured by the Constitution, it may add to the efficacy of the writ. Statutes are usually enacted for this purpose and should be construed so as to promote the effectiveness of the proceeding." Id. Addressing the enactment of the UPCA, the supreme court concluded the UPCA is "an expansion of the Writ of Habeas Corpus." Dionne v. State, 93 Idaho 235, 237, 459 P.2d 1017 (1969).

Because the UPCA is an expansion of the writ of habeas corpus and the legislature is not barred from adding to the efficacy of the writ, it naturally follows that I.C. § 19-2719(5)(c) does not unduly restrict the district court's jurisdiction in violation of the separation of powers doctrine. Rather, I.C. § 19-2719(5)(c) merely establishes the parameters in which relief may be granted when a successive post-conviction petition has

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been filed. As explained in Kirkland v. Blaine County Medical Ctr., 134 Idaho 464, 471, 4 P.3d 1115 (2000):

Because it is properly within the power of the legislature to establish statutes of limitations, statutes of repose, create new causes of action, and otherwise modify the common law without violating separation of powers principles, it necessarily follows that the legislature also has the power to limit remedies available to plaintiffs without violating the separation of powers doctrine.

Because the legislature has the power to limit the remedies available to plaintiffs, it necessarily has the power to limit the remedies of capital petitioners in seeking post-conviction relief. Stuart has failed to establish I.C. § 19-2719(5)(c) results in a constitutional violation under the separation of powers doctrine.

b. Because I.C. § 19-2719(5)(c) Merely Codifies *Fetterly* And *Stuart V*, Idaho Law Does Not Prohibit Its Retroactive Application

As explained above and in the state's Brief in Support of Motion for Summary Dismissal, prior to the enactment of I.C. § 19-2719(5)(c), the Idaho Supreme Court had already reasoned that I.C. § 19-2719 does not contain a provision permitting the filing of a successive post-conviction claim based upon the retroactive application of new rules of law. Fetterly, 121 Idaho at 418; Stuart V, 128 Idaho at 437-38. Therefore, Idaho law that generally prohibits the retroactive application of new statutory enactments is inapplicable in Stuart's case.

Further, because Stuart's instant successive post-conviction petition was filed after the enactment of I.C. § 19-2719(5)(c), the doctrine regarding the retroactive application of new statutory enactments is inapplicable.

c. Idaho Code § 19-2719(5)(c) Does Not Violate Stuart's Due Process Or Equal Protection Rights

Stuart contends I.C. § 19-2719(5)(c) violates his equal protection and due process rights because it allegedly offers capital petitioners less protection than non-capital petitioners under the UPCPA. (Brief in Opp., pp.33-35.) Stuart's contention is based upon the claim that there is "no rational basis for the disparate treatment of non-capital prisoners." (Brief in Opp., p.34.)

While the Idaho Supreme Court has not directly addressed this issue in regards to I.C. § 19-2719(5)(c), the issue has been repeatedly addressed in the general context of I.C. § 19-2719 and rejected. In State v. Beam, 115 Idaho 208, 211-13, 766 P.2d 678 (1988), the court expressly held I.C. § 19-2719 does not violate equal protection. In State v. Rhoades, 120 Idaho 795, 806, 820 P.2d 665 (1991), the court expressly concluded I.C. § 19-2719 does not violate due process. The Idaho Supreme Court has repeatedly affirmed both of these cases. See Lankford v. State, 127 Idaho 100, 102, 897 P.2d 991 (1995); State v. Hoffman, 123 Idaho 638, 647, 851 P.2d 934 (1993); State v. Card, 121 Idaho 425, 430-31, 825 P.2d 1081 (1991); State v. Rhoades, 121 Idaho 63, 72, 822 P.2d 960 (1991); Paz v. State, 118 Idaho 542, 559, 798 P.2d 1 (1990); State v. Fetterly, 115 Idaho 231, 235-36, 766 P.2d 701 (1988).

Because Stuart has failed to even cite these cases, he obviously has failed to provide any argument as to why they are not controlling as to I.C. § 19-2719(5)(c). Because there is no logical distinction between the Idaho Supreme Court's general analysis of I.C. § 19-2719 and I.C. § 19-2719(5)(c), Stuart's contention fails.

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d. Idaho Code § 19-2719(5)(c) Does Not Violate Ex Post Facto Laws

The United States Constitution, article I, § 10, and the Idaho Constitution, article I, § 16, prohibit the enactment of ex post facto laws. As explained in State v. Byers, the United States Supreme Court has defined what constitutes an ex post facto law:

1<sup>st</sup>, every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Byers, 102 Idaho 159, 166, 627 P.2d 788 (1981) (quoting Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798)).

The Supreme Court's ex post facto jurisprudence has focused upon the third category because such laws "implicate the **central concerns** of the Ex Post Facto Clause: the lack of fair notice and governmental restraint **when the legislature increases punishment** beyond what was prescribed when the crime was consummated." Lynce v. Mathis, 519 U.S. 433, 441 (1997)(internal quotes and citations omitted)(emphasis added).

As explained in Dobbert v. Florida, 432 U.S. 282, 293 (1977), the Ex Post Facto Clause generally does not apply to procedural matters:

It is equally well settled, however, that the inhibition upon the passage of ex post facto laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed. The constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance.

Even though it may work to the disadvantage of a defendant, a **procedural change is not ex post facto**.



(Internal quotes and citations omitted) (emphasis added).

The Supreme Court has identified “two critical elements [that] must be present for a criminal or penal law to be ex post facto: It must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.” Weaver v. Graham, 450 U.S. 24, 29 (1980)(footnote omitted). However, “no ex post facto violation occurs if the change effected is merely procedural, and does not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.” Id. at 29 n.12. “Critical to relief under the Ex Post Facto Clause is not an individual’s right to less punishment, but the lack of fair notice and governmental restraint **when the legislature increases punishment** beyond what was prescribed when the crime was consummated.” Id. at 29 (emphasis added).

The Supreme Court, in Collins v. Youngblood, 497 U.S. 37 (1990), narrowed what constitutes an ex post facto violation by overruling several prior cases. After the defendant was sentenced, the Texas legislature amended the remedy that was available when an unauthorized fine was imposed at sentencing. Under the law at the time the defendant was sentenced, if the law did not authorize the fine, the judgment and sentence were void and the defendant was entitled to a new trial. Id. 497 U.S. at 39. After Youngblood was sentenced, new legislation was enacted permitting the appellate court to merely reform an improper verdict, thereby eliminating the new trial remedy. Id. at 40. The Supreme Court reiterated that procedural changes do not violate the Ex Post Facto Clause. Id. at 45. The Court reasoned, “While these cases do not explicitly define what they mean by the word ‘procedural,’ it is logical to think that the term refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the

substantive law of crimes.” *Id.* at 45. The Court concluded the new statute “is a **procedural change that allows reformation of improper verdicts**. It does not alter the definition of the crime of aggravated sexual abuse, . . . nor does it increase the punishment for which he is eligible.” *Id.* at 44 (emphasis added). The Court explained that language from other cases discussing whether a procedural change may violate the Ex Post Facto Clause if it deprived a defendant of “substantial protections” or infringed upon “substantial personal rights,” had “imported confusion into the interpretation of the Ex Post Facto Clause.” *Id.* at 45.

Idaho’s appellate courts have followed the Supreme Court cases detailed above. *See Lovelace*, 2003 WL 21697869 at \*13-14. In *Mellinger v. State*, 113 Idaho 31, 34, 740 P.2d 73 (Ct. App. 1987), the Idaho Court of Appeals quoted *Dobbett* and *Miller* in concluding that a change in the statute of limitations in Idaho’s Uniform Post-Conviction Procedures Act (“UPCPA”) was procedural in nature and did not materially affect the petitioner’s substantial rights. *See also LaFon v. State*, 119 Idaho 387, 389-90, 807 P.2d 66 (Ct. App. 1991); *Esquivel v. State*, 128 Idaho 390, 913 P.2d 1160 (Ct. App. 1996). The Idaho Supreme Court expressly adopted *Mellinger* in *State v. O’Neill*, 118 Idaho 244, 247, 796 P.2d 121 (1990). In *Paradis v. State*, 128 Idaho 223, 227, 912 P.2d 110 (1996), the Idaho Supreme Court applied the rationale of *O’Neill* in a capital case.

This same analysis has also been applied to the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”), which was enacted by Congress in 1996 and significantly changed the manner in which federal habeas cases are litigated and limited the cases in which the federal courts can grant habeas relief. The federal courts have uniformly held that, because the changes made by the AEDPA are procedural in nature, they do not

violate the Ex Post Facto Clause. Libby v. Magnusson, 177 F.3d 43, 46-47 (1<sup>st</sup> Cir. 1999); Seymour v. Walker, 224 F.3d 542, 560 (6<sup>th</sup> Cir. 2000); Neelley v. Nagle, 138 F.3d 917, 921 (11<sup>th</sup> Cir. 1998) (overruled on other grounds by Williams v. Taylor, 529 U.S. 362 (2000)); United States v. Ortiz, 136 F.3d 161, 168-69 (D.C. Cir. 1998).

Similar analysis was used in Mitchell v. State, 934 P.2d 346, 349 (Okla. Crim. App. 1997), when the petitioner challenged amendments to Oklahoma's capital post-conviction statutes. The court explained that, because such changes were "procedural in nature," they did not violate the Ex Post Facto Clause. Id.

Likewise, the enactment of I.C. § 19-2719(5)(c) was procedural in nature. The statute "neither made criminal a theretofore innocent act, nor aggravated a crime previously committed, nor provided a greater punishment, nor changed the proof necessary to convict." Seymour, 224 F.3d at 560 (quoting Dobbert, 432 U.S. at 293). Rather, "these provisions simply limit the circumstances under which [Stuart] may collaterally attack his conviction." Libby, 177 F.3d at 46.

3. The Idaho Supreme Court Has Implicitly Rejected Stuart's Argument Regarding *Teague v. Lane*

Stuart contends that under the Supremacy Clause of the United States Constitution, I.C. § 19-2719(5)(c) is supplanted by the dictates of Teague v. Lane, 489 U.S. 288 (1989). (Resp. in Opp., pp.26-33.) However, the Idaho Supreme Court has implicitly rejected Stuart's argument.

Idaho Code § 19-2719 "provides a defendant with one opportunity to raise **all challenges** to the conviction and sentence in a petition for post-conviction relief." Porter v. State, 136 Idaho 257, 259, 32 P.3d 151 (2001) (emphasis added). The **only exception**

is provided in I.C. § 19-2719(5), which permits a successive petition “in those unusual cases where it can be demonstrated that the issues raised were not known and reasonably could not have been known within the time frame allowed by the statute.” Creech, 137 Idaho at 575.

Idaho Code § 19-2719 does not permit the filing of a successive post-conviction petition based upon substantive changes in the law, Teague or its two exceptions. In Fetterly, the Idaho Supreme Court implicitly rejected Teague. In dissent, Justice Bistline opined that Teague should be applied to Fetterly’s case. Fetterly, 121 Idaho at 420 (Bistline, J., dissenting). However, because Fetterly’s case was already final when he filed his successive post-conviction petition, the majority ignored Teague and concluded, based upon Griffith v. Kentucky, 479 U.S. 314 (1987), that the holding in State v. Charboneau, 116 Idaho 129, 774 P.2d 2999 (1989), should not be applied retroactively. Fetterly, 121 Idaho at 418-19.

Admittedly, in Gafford v. State, 127 Idaho 472, 476, 903 P.2d 61 (1995), the Idaho Supreme Court applied Teague, in the context of a state petition for writ of habeas corpus. After being acquitted of criminal charges by reason of insanity, Gafford was confined at State Hospital South. During his commitment, Gafford’s situation changed such that he no longer suffered from the mental condition that lead to his acquittal. Id. 127 Idaho at 474. The United States Supreme Court subsequently struck down a Louisiana statute that allowed an insanity acquittee to be committed to a mental institution until he could demonstrate he was not dangerous, even though he was no longer mentally ill. Id. (citing Foucha v. Louisiana, 504 U.S. 71 (1992)). Relying upon Foucha, Gafford filed a state petition for writ of habeas corpus seeking his release on the

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ground he was not mentally ill. Id. 127 Idaho at 474. The Idaho Supreme Court concluded:

Gafford does not seek to have the holding in *Foucha* applied retroactively; he seeks the prospective application of that new rule to his present and continued confinement. Accordingly, the retroactivity rules cited by the State and relied upon by the district court have no application in this case.

Id. 127 Idaho at 476.

In dicta, the court further opined even if Foucha presented a retroactivity problem, because it “require[d] the observance of procedures ‘implicit in the concept of ordered liberty,’” it would apply to Gafford’s case. Id. 127 Idaho at 476 (quoting Penry v. Lynaugh, 492 U.S. 302 (1989)). Relying upon State v. Chilton, 112 Idaho 823, 828, 736 P.2d (1987), the supreme court concluded, “*Foucha* announced a rule grounded in due process and formulated to protect a fundamental liberty interest.” Gafford, 128 Odajp at 476.

However, Gafford, a civil commitment case, has never been applied in the context of a criminal case, let alone a successive post-conviction case collaterally attacking a capital case. In fact, the Idaho Supreme Court refused to apply Gafford in a post-conviction case. Buffington v. State, 130 Idaho 507, 943 P.2d 933 (1997) (refusing to adopt the dissent’s position that Gafford’s “new rule” doctrine should be applied).

Because I.C. § 19-2719 does not contain a Teague exception, the question of the retroactivity of Ring is governed exclusively by the dictates of I.C. § 19-2719 and its interpretation by the Idaho Supreme Court.

4. Ring Announced Changes Involving Rules Of Procedure That Are Not Substantive In Nature

Despite contending Teague supplements I.C. § 19-2719(5)(c), Stuart contradicts himself by contending that Teague does not apply to his case, because the rule announced in Ring is substantive and not procedural in nature. (Resp. in Opp., pp.27-29.) Contrary to Stuart's contention, Ring involves a procedural rule and is not substantive in nature. While Stuart relies upon general principles discussed in Bousley v. United States, 523 U.S. 614 (1998), he fails to cite a single case in which the courts have found that Ring or Appendi v. New Jersey, 530 U.S. 466 (2000), which formed the basis of the Supreme Court's decision in Ring, involves a substantive rule.<sup>1</sup> (Pet's brief, pp.27-28.)

While the Idaho appellate courts have yet to address this issue, the Idaho Supreme Court has addressed it in the context of ex post facto law. In Lovelace, 2003 WL 21697869 at \*13-14, the defendant claimed that, because recent changes in Idaho's capital sentencing law allegedly created a new offense of capital murder, his resentencing would create an ex post facto violation. The supreme court concluded the changes were not substantive, explaining:

Idaho Code § 18-4004 describes first-degree murder and prescribes a punishment of life imprisonment or death pursuant to the guidelines outlined in I.C. § 19-2515. Clearly, Lovelace had fair warning that death was a possible punishment for first-degree murder, and we cannot conclude that the subsequent statute authorized a more onerous punishment than that authorized by the unconstitutional statute. A new law that did not alter the definition of the crime . . . of which Lovelace was convicted, nor increase the punishment for which he was eligible as a result of that conviction was a procedural change.

<sup>1</sup> The state acknowledges that in Summerlin, the Ninth Circuit found, contrary to every other jurisdiction addressing the issue, that Ring involves a substantive rule of law and not merely a procedural rule. However, as described below, the Ninth Circuit's opinion is not well taken and should be rejected by this court.

The inhibition against the passage of ex post facto laws does not extend to limit the legislative control of remedies and modes of procedure, which do not affect matters of substance. Under the new sentencing statutes, the state must prove the same aggravating circumstances required by the former statute and must prove them to a jury beyond a reasonable doubt.

*Id.* at \*14 (internal quotations and citations omitted).

Several federal circuits have used this same analysis to conclude that Apprendi involved a new rule of law that is **procedural** in nature. In McCoy v. United States, 266 F.3d 1245, 1257 n.16 (11<sup>th</sup> Cir. 2001), the court concluded Apprendi involved **procedural** rules:

In Apprendi, the Supreme Court specifically noted that “[t]he substantive basis for New Jersey’s enhancement . . . is not at issue; the adequacy of New Jersey’s procedure is.” 530 U.S. at 475, 120 S.Ct. 2348 (2000). The application of Apprendi merely changes the method or procedure for determining drug quantity and his sentence; it does not make McCoy’s conduct not criminal, thereby raising the spectre of actual innocence as the concurring opinion implies. Thus, as other circuits have, we conclude Apprendi announced a new rule of criminal procedure.

See also United States v. Sanders, 247 F.3d 139, 145-46 (4<sup>th</sup> Cir. 2001); United States v. Brown, 305 F.3d 304, 308-09 (5<sup>th</sup> Cir. 2002); Curtis v. United States, 294 F.3d 841, 842-43 (7<sup>th</sup> Cir. 2002); United States, ex rel. Perez v. Warden, FMC Rochester, 286 F.3d 1059, 1063 (8<sup>th</sup> Cir. 2002) (citing United States v. Moss, 252 F.3d 993, 997-98 (8<sup>th</sup> Cir. 2001)).

In Cannon v. Mullin, 297 F.3d 989, 994 (10<sup>th</sup> Cir. 2002), the court explained that Ring also involves a **procedural** rule, because the same analysis regarding the question of whether Apprendi involves a **procedural** rule applies to Ring. Likewise, in Turner v. Crosby, 339 F.3d 1247, 1284 (11<sup>th</sup> Cir. 2003) (internal quotes and citations omitted), the court explained:

Just as *Apprendi* constitutes a procedural rule because it dictates what fact-finding procedure must be employed, *Ring* constitutes a procedural rule because it dictates what fact-finding procedure must be employed in a capital sentencing hearing. *Ring* changed neither the underlying conduct the state must prove to establish a defendant's crime warrants death nor the state's burden of proof. *Ring* affected neither the facts necessary to establish [Idaho's] aggravating factors nor the State's burden to establish those factors beyond a reasonable doubt. Instead, *Ring* altered only who decides whether any aggravating circumstances exist and, thus, altered only the fact-finding procedure.

Additionally, Idaho's sister states have concluded *Ring* is a **procedural** rule. As explained in *State v. Towry*, 64 P.3d 828, 832-33 (Ariz. 2003) (internal quotations and citations omitted), "Substantive rules determine the meaning of a criminal statute. Decisions announcing substantive rules often address the criminal significance of certain facts or the underlying prohibited conduct. In contrast, procedural decisions set forth fact-finding procedures to ensure a fair trial." The Arizona Supreme Court concluded, because *Ring* is nothing more than an extension of *Apprendi* to capital cases, that it is not substantive, but **procedural** in nature. *Id.* 64 P.3d at 833. See also *Colwell v. State*, 59 P.3d 463, 472-73 (Nev. 2002) ("our first inquiry is whether the constitutional rule of criminal procedure established in *Ring* is new"); *State v. Lotter*, 664 N.W.2d 892, 904-05 (Neb. 2003) ("the new constitutional rule announced in *Ring* was procedural, not substantive"); *Head v. Hill*, 2003 WL 22282293, \*3 (Ga. 2003) ("the new rule announced in *Ring*, which overruled *Walton*, . . . , was a new rule of criminal law").

Based upon the analysis in *Lovelace* and other courts extending the non-retroactivity rule of *Apprendi* to *Ring*, there is no doubt that *Ring* is a rule of procedure. *Ring* changed only to whom the requisite elements of capital murder must be proven, not the actual elements required for imposition of the death penalty or the burden of proof.



5. Even If *Teague v. Lane* Supplements I.C. § 19-2719, Stuart Has Still Failed To Establish *Ring* Is Retroactive

a. The Legal Parameters Of *Teague v. Lane*

In *Teague*, the United States Supreme Court discussed the problems associated with applying new constitutional rules not in existence at the time a criminal conviction becomes final:

Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions shows only that conventional notions of finality should not have as much place in criminal as in civil litigation, not that they should have none. If a criminal judgment is ever to be final, the notion of legality must at some point include the assignment of final competence to determine legality.

....

The costs imposed upon the States by retroactive application of new rules of constitutional law on habeas corpus generally far outweigh the benefits of this application. In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, for it continually forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards. . . . [S]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a habeas proceeding, new constitutional demands.

*Id.* 489 U.S. at 309-10 (internal citations and emphasis omitted).

As explained in *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997), a three-step process is required to complete the *Teague* analysis:

First, [the court] determines the date upon which the defendant's conviction became final. *See Caspari v. Bohlen*, 510 U.S. 383, 390, 114 S.Ct. 948, 953-54, 127 L.Ed.2d 236 (1994). Second, [the court] must "[s]urve[y] the legal landscape as it then existed," *Graham v. Collins*, [506 U.S. 461, 468, 113 S.Ct. 892, 898, 122 L.Ed.2d 260 (1993)], and 'determine whether a state court considering [the defendant's] claims at

the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution,' *Saffle v. Parks*, 494 U.S. 484, 488 [110 S.Ct. 1257, 1260, 108 L.Ed.2d 415] (1990)." *Caspari, supra*, at 390, 114 S.Ct. at 953. Finally, if the court determines that the habeas petitioner seeks the benefit of a new rule, the court must consider whether the relief sought falls within one of the two narrow exceptions to nonretroactivity. *See Gilmore v. Taylor*, 508 U.S. 333, 345, 113 S.Ct. 2112, 2119, 124 L.Ed.2d 306 (1993).

i. Determining Finality

Finality has been defined as "a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith*, 479 U.S. at 321 n.6.

ii. Determining The Legal Landscape As It Then Existed

In *Teague*, the Court discussed what constitutes a new rule:

[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. [Citations omitted]. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.

*Id.* 489 U.S. at 301 (emphasis in original).

In determining if the result is "dictated," decisions must be based upon Supreme Court precedent and be more than reasonable interpretations of prior law:

[T]he *Teague* inquiry – which is applied to Supreme Court decisions that are, one must hope, *usually* the most reasonable interpretation of prior law – requires more than [a reasonable interpretation of prior law – perhaps even the most reasonable one]. It asks whether the [decision] was *dictated* by precedent – i.e., whether *no other* interpretation was reasonable.

*Lambrix*, 520 U.S. at 538.

While the Ninth Circuit has expressed “serious doubt as to the wisdom” of the view that state courts are free to ignore decisions of the lower federal courts on questions of federal law, Yniquez v. Arizona, 939 F.2d 727, 736 (9<sup>th</sup> Cir. 1991), there is no authority requiring the states’ adoption of lower federal courts’ decisions. In vacating the Ninth Circuit’s decision in Yniquez, the Supreme Court characterized the dicta regarding the question of a state’s inability to ignore lower federal court decisions on questions of federal law as “remarkable.” Arizonans for Official English v. Arizona, 520 U.S. 43, 58, n.11 (1997). The Court recognized “state courts . . . possess the authority, absent a provision for exclusive federal jurisdiction, to render binding decisions that rest on their own interpretations of federal law.” Id. (quoting Asarco Inc. v. Kadish, 490 U.S. 605, 617 (1989)). The Court further cited Lockhart v. Fretwell, 506 U.S. 364, 375-76 (1993) (Thomas, J., concurring), in which Justice Thomas explained state trial courts are not obligated to follow the federal circuits’ interpretation of federal law. Id. Justice Thomas explained:

The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court’s interpretation of federal law give way to a (lower) federal court’s interpretation. In our federal system, a state trial court’s interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located. [Citations omitted]. An Arkansas trial court is bound by this Court’s (and by the Arkansas Supreme Court’s and Arkansas Court of Appeals’) interpretation of federal law, but if it follows the Eighth Circuit’s interpretation of federal law, it does so only because it chooses to and not because it must.

Lockhart, 506 U.S. at 375-76.

Because state trial courts are not obligated to follow a federal circuit court’s interpretation of federal law (and any rule requiring such would itself be a “new rule”), it is inconsistent to conclude that existing precedent established by a federal circuit court

would result in states feeling compelled to conclude the rule established by that precedent is required by the Constitution, particularly when other circuits have contrary precedent. This fundamental principle was followed by the Idaho Supreme Court in Charboneau, 116 Idaho at 146-47, when the Idaho Supreme Court expressly rejected the Ninth Circuit's conclusion in Adamson v. Ricketts, 865 F.2d 1011 (9<sup>th</sup> Cir. 1988), that the federal Constitution required jury sentencing in capital cases. This principle has also been followed by the Arizona Supreme Court in rejecting the Ninth Circuit's pronouncement in Summerlin, that Ring is retroactive. State v. Sansing, \_\_\_ P.3d \_\_\_, \_\_\_, 2003 WL 22204113, \*1 n.2 (Ariz. 2003) ("We are not bound by the Ninth Circuit's interpretation of what the Constitution requires").

iii. The Two Teague Exceptions

In Lambrix, the Court discussed the two Teague exceptions. Specifically addressing the first exception, the Court explained:

"The first exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe, *see Teague*, 489 U.S., at 311 [109 S.Ct. at 1075-1076], or addresses a 'substantive categorical guarante[e] accorded by the Constitution,' such as a rule 'prohibiting a certain category of punishment for a class of defendants because of their status or offense.'"

Id. 520 U.S. at 539 (quoting Saffle v. Parks, 494 U.S. 484, 494 (1990)).

The second exception applies to "watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." Lambrix, 520 U.S. at 539-40 (quoting Parks, 494 U.S. at 495). As explained in Teague, this exception has very limited application:

Typically, it should be the case that any conviction free from federal constitutional error at the time it became final, will be found, upon

reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing. However, in some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction. For example, such, in my view, is the case with the right to counsel at trial now held a necessary condition precedent to any conviction for a serious crime.

Teague, 489 U.S. at 312 (quoting Mackey v. United States, 401 U.S. 667, 693-94 (1971)).

In applying the second exception, the rule “must not only improve accuracy [of trial], but also ‘alter our understanding of the *bedrock procedural elements*’ essential to the fairness of a proceeding.” Sawyer v. Smith, 497 U.S. 227, 242 (1990) (quoting Teague, 489 U.S. at 311); *see also* Tyler v. Cain, 533 U.S. 656, 665 (2001). In Gray v. Netherland, 518 U.S. 152, 170 (1996), the Court further discussed what constitutes a “watershed rule” of criminal procedure:

We observed in Saffle v. Parks that the paradigmatic example of a watershed rule of criminal procedure is the requirement that counsel be provided in all criminal trials for serious offenses. 494 U.S., at 495, 110 S.Ct. at 1264 (citing Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)). “Whatever one may think of the importance of [petitioner’s] proposed rule, it has none of the primacy and centrality of the rule adopted in Gideon or other rules which may be thought to be within the exception.” Parks, supra, at 495, 110 S.Ct. at 1264.

As further explained in Teague, 489 U.S. at 313, it will be “unlikely that many such components of basic due process have yet to emerge.” The exceptions must be read consistently with other constitutional rules and policies. “Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.” Id. 489 U.S. at 309. “The ‘costs imposed upon the State[s] by retroactive application of

new rules of constitutional law on habeas corpus thus generally far outweigh the benefits of this application.” Sawyer, 497 U.S. at 242 (quoting Solem v. Stumes, 465 U.S. 638, 654 (1984)).

Since Teague was issued in 1989, the Supreme Court has examined numerous new rules under the second exception and found none fit within its narrow confines. Teague, 489 U.S. at 311-16 (unconstitutional use of peremptory challenges to remove venire members); Butler v. McKellar, 494 U.S. 407, 416 (1990) (Fifth Amendment proscription barring police-initiated interrogation following suspect’s request for counsel in separate investigation); Saffle v. Parks, 494 U.S. 484, 495 (1990) (Eighth Amendment requirement that jury be allowed to base sentencing decision upon sympathy); Sawyer, 497 U.S. at 241-45 (Eighth Amendment proscription against diminishing jury’s sense of responsibility for capital sentencing decision); Graham v. Collins, 506 U.S. 461, 478 (1993) (jury was prevented from adequately considering certain mitigation evidence); Gilmore v. Taylor, 508 U.S. 333, 345 (1993) (due process violation based upon instructions preventing the jury from considering evidence of defendant’s affirmative defense); Caspari v. Bohlen, 510 U.S. 383, 396 (1994) (application of the double jeopardy clause to successive non-capital sentencing); Goerke v. Branch, 514 U.S. 115, 120 (1995) (substantive due process rights prohibit dismissal of appeal of recaptured fugitive); Gray, 518 U.S. at 170 (due process violation where defendant was not given adequate notice of evidence commonwealth intended to use against him at capital sentencing hearing); Lambrix, 520 U.S. at 539-40 (jury’s consideration of a constitutionally vague aggravator tainted the trial court’s sentence); O’Dell v. Netherland, 521 U.S. 151, 167 (1997) (rule requiring capital defendant be permitted to inform jury he

is parole-eligible); Tyler, 533 U.S. at 665-66 (reasonable doubt jury instruction that reduced state's burden of proof).

b. Because the Supreme Court's Holding in *Ring* Constitutes A New Rule In Violation of *Teague*, This Court May Not Apply *Ring* Retroactively To Stuart's Successive Post-Conviction Case

Even if this court concludes it must analyze Stuart's case pursuant to the dictates of Teague, because Ring is a new rule, his successive claims must be dismissed.

i. Stuart's Appeal Was Final In 1986

Finality has been defined "for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." Caspari, 510 U.S. at 390. Stuart's conviction was final in 1986, when the time for filing a petition for certiorari expired from the Idaho Supreme Court's opinion in Stuart I.

ii. The New Rule From *Ring* Was Not Dictated By Prior Supreme Court Precedent

Beginning in 1983, the Idaho Supreme Court, examining cases from the United States Supreme Court, rejected claims that jury involvement in capital sentencings was mandated by the Constitution. See State v. Sivak, 105 Idaho 900, 904, 674 P.2d 396 (1983); State v. Creech, 105 Idaho 362, 372-73, 670 P.2d 463 (1983). In 1989, the Idaho Supreme Court exhaustively detailed the line of United States Supreme Court decisions dating back to 1976 and establishing that judicial sentencing in capital cases did not violate the Constitution. Charboneau, 116 Idaho at 146-47. In 1990, the Supreme Court

reaffirmed those prior cases and expressly reasoned that a trial judge, sitting alone, was permitted to determine the existence or absence of statutory aggravating factors. Walton, 497 U.S. at 647-49. Ten years later, the Supreme Court concluded, the Sixth Amendment does not permit a defendant to be “expose[d] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.” Appendi, 530 U.S. at 483 . Two years later in Ring, 536 U.S. at 585, the Supreme Court concluded Appendi was irreconcilable with Walton, and overruled Walton, “to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for the imposition of the death penalty.”

As explained above, Appendi and Ring constitute a new rule in violation of Teague. In 1986 when Stuart’s conviction became final and the state courts surveyed the legal landscape to address the question of whether juries were constitutionally mandated to find statutory aggravating factors, the unequivocal answer was no. As explained in Graham, 506 U.S. at 467, “there can be no dispute that a decision announces a new rule if it expressly overrides a prior decision.”

iii. Ring Does Not Fall Within Either Of The Two Narrow Teague Exceptions

Because Ring announced a new rule of law, this court must determine if it falls within one of the two exceptions to the nonretroactivity doctrine. As in Parks, 494 U.S. at 494, “[t]he rule sought by [Stuart] would neither decriminalize a class of conduct nor prohibit the imposition of . . . punishment on a particular class of persons.” Therefore, Ring does not fall within the first Teague exception. See Summerlin, 341 F.3d at 1109; Turner, 330 F.3d at 1295; Lotter, 664 N.W.2d at 905; Towry, 64 P.3d at 833.



Several federal circuits have concluded Ring does not fall within Teague's second exception. In Trueblood v. Davis, 301 F.3d 784, 788 (7<sup>th</sup> Cir. 2002), the Seventh Circuit implicitly concluded the second exception does not apply "because the Supreme Court has not yet held it to be retroactive." In Moore v. Kinney, 320 F.3d 767, 771 n.3 (8<sup>th</sup> Cir. 2003), the Eighth Circuit explained, "Absent an express pronouncement on retroactivity from the Supreme Court, the rule from Ring is not retroactive." In Cannon, 297 F.3d at 993-94, the Tenth Circuit rejected the petitioner's claim that Ring falls within Teague's second exception. See also Workman v. Mullin, \_\_\_ F.3d \_\_\_, \_\_\_, 2003 WL 22024965, \*13 (10<sup>th</sup> Cir. 2003) ("Ring may not be applied retroactively to cases on collateral review"). Finally, in Turner, 339 F.3d at 1283-86, the Eleventh Circuit recognized the narrowness of the second exception, compared Ring with Apprendi, and expressly concluded, "Ring simply does not fall within the ambit of the second Teague exception."

The court explained:

Pre-Ring sentencing procedure does not diminish the likelihood of a fair sentencing hearing; instead, Ring's new rule, at most, would shift the fact-finding duties during Turner's penalty phase from (a) an impartial judge after an advisory verdict by a jury to (b) an impartial jury alone. Ring is based on the Sixth Amendment right to a jury trial and not on a perceived, much less documented, need to enhance accuracy or fairness of the fact-finding in a capital sentencing context.

Id. 339 F.3d at 1286 (footnote omitted).

A number of Idaho's sister states have concluded Ring does not fit within Teague's second exception. In Towery, 64 P.3d at 833, Arizona's Supreme Court expressly concluded Ring does not fit within the second exception, because it "merely shifts the fact-finding duty from an impartial judge to an impartial jury." The court explained:

Requiring a jury to determine the existence of aggravating circumstances does not “increase[] the reliability of the guilty-innocence determination at all because” *Ring II* does not affect a jury’s determination of guilt or innocence. See *United States v. Moss*, 252 F.3d 993, 999 (8<sup>th</sup> Cir. 2001)(concluding that *Apprendi* does not qualify under the second *Teague* exception). Rather, *Ring II* prohibits a validly convicted defendant from being exposed to the death penalty unless a jury finds the existence of certain aggravating factors. See *id.*

*Id.* Further, discussing whether *Ring* enhances the likelihood of a fair sentencing hearing, the court reasoned, “*Ring II* merely shifts the fact-finding duty from an impartial judge to an impartial jury. [Citations omitted]. We have no reason to believe that impartial juries will reach more accurate conclusions regarding the presence of aggravating circumstances than did an impartial judge.” *Id.* at 833-34.

Discussing whether *Ring* alters the understanding of the “bedrock procedural elements essential to the fairness of a proceeding,” the court explained, “one can easily envision a system of ‘ordered liberty’ in which certain elements of a crime can or must be proved to a judge, not to the jury.” *Id.* at 834 (quoting *United States v. Shunk*, 113 F.3d 31, 37 (5<sup>th</sup> Cir. 1997)). The court also examined several Supreme Court cases, including *DeStefano v. Woods*, 392 U.S. 631, 633 (1968), in which the Supreme Court declined to make *Duncan v. Louisiana*, 391 U.S. 145 (1968), retroactive. *Towery*, 64 P.3d at 834. *Duncan* held that the Sixth Amendment right to a jury trial applies to the states through the Fourteenth Amendment. The Supreme Court, declining to make *Duncan* retroactive, concluded, “We would not assert, however, that every criminal trial – or any particular trial – held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.” *DeStefano*, 392 U.S. at 158. While *DeStefano* was a pre-*Teague* case, it is difficult to imagine that a case merely requiring a

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jury to find statutory aggravating factors is retroactive when the right to a jury trial on the elements of the underlying first-degree murder was not applied retroactively.

The Arizona court also recognized that in Neder v. United States, 527 U.S. 1, 9 (1999), the Supreme Court concluded a judge's failure to instruct and submit an element of the offense to a jury was subject to harmless error analysis. Towery, 64 P.3d at 834-35. Because the failure to have a jury find a statutory aggravating circumstance is similar to failing to submit an underlying element to the jury, "it would be inconsistent with Neder to now find that Ring II is a watershed rule that 'implicate[s] the fundamental fairness of the trial.'" Id. (quoting Teague, 489 U.S. at 312).

In Colwell, 59 P.3d at 373, the Nevada Supreme Court concluded Ring is not retroactive, because it "is based simply on the Sixth Amendment right to a jury trial, not on a perceived need to enhance accuracy in capital sentencings."

Relying upon several of the cases cited above, in Lotter, 664 N.W.2d at 905-08, Nebraska's Supreme Court recognized that Teague's second exception is inapplicable to Ring. The court explained Apprendi is the "jurisprudential source of the Sixth Amendment principle established by Ring." Id. 664 N.W.2d at 907. Therefore, the court relied upon the plethora of jurisdictions, including the Ninth Circuit in United States v. Sanchez-Cervantes, 282 F.3d 664 (9<sup>th</sup> Cir. 2002), which concluded Teague's second exception does not apply to Apprendi. Id. 664 N.W.2d at 907.<sup>2</sup>

Unquestionably, the right to a jury trial is an important constitutional right. However, as explained in Duncan, "We would not assert, however, that every criminal

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<sup>2</sup> As noted in Harris v. United States, 536 U.S. 545, 581, 122 S.Ct. 2406, 2407 (2002) (Thomas, J., dissenting), "No Court of Appeals, let alone this Court has held that Apprendi has retroactive effect." See also Curtis v. United States, 294 F.3d 841, 842 (7<sup>th</sup> Cir. 2002) (listing cases).

trial – or any particular trial – held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.” *Id.* 391 U.S. at 158. In fact, because the right to a jury trial is not as “fundamental” as Stuart would like this court to believe, Duncan was given only prospective application. DeStafano, 392 U.S. at 633-34. In light of the other United States Supreme Court decisions rejecting the second exception, the state submits Ring does not rise to the level of requiring that counsel be provided in all criminal trials for serious offenses, which is the standard for determining whether the second exception has been met. Parks, 494 U.S. at 495.

The state is aware of only one jurisdiction, the Ninth Circuit, which has concluded Ring is retroactive to cases on collateral review.<sup>3</sup> See Summerlin, *supra*. The Ninth Circuit’s rationale is primarily based upon the conclusion that “death is different.” *Id.* 341 F.3d at 1109-10. While the Supreme Court has concluded, in limited areas, that capital cases require heightened scrutiny, the Supreme Court in the context of Teague analysis has rejected the concept. In Sawyer, 497 U.S. at 242, the petitioner claimed the second Teague exception “should be read to include **new rules of capital sentencing** that ‘preserve the accuracy and fairness of capital sentencing judgments.’” (Emphasis added). The Supreme Court rejected the implied claim that different Teague rules apply in capital cases and concluded, “The scope of the *Teague* exceptions must be consistent with the recognition that ‘[a]pplication of constitutional rules not in existence at the time a conviction becomes final seriously undermines the principle of finality which is essential

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<sup>3</sup> In State v. Whitfield, 107 S.W.2d 253 (Mo. 2003), the Missouri Supreme Court applied Ring retroactively. However, the court’s decision was not based upon Teague, but state law. *Id.* 107 S.W.2d at 264-69.

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to the operation of our criminal justice system.” Sawyer, 497 U.S. at 242 (quoting Teague, 489 U.S. at 390).

The Ninth Circuit also concluded that Arizona’s capital sentencing procedure allowed “extra-judicial factors to enter into the ultimate judgment.” Summerlin, 341 F.3d at 1115. However, the court failed to explain how those same factors do not enter into non-capital cases under Apprendi. Additionally, the court failed to recognize that juries, like judges, may receive an “inordinate amount of inadmissible evidence.” Summerlin, 341 F.3d at 1117. However, unlike “trial judges [who] are presumed to know the law and to apply it in making their decisions,” Lambrix, 520 U.S. at 532 n.4, juries only ignore inadmissible evidence if the trial judge gives an appropriate instruction, which is generally based upon an objection from counsel. The Ninth Circuit’s concern about hearsay statements from presentence reports is also unavailing. In Idaho, the court may consider hearsay evidence in a presentence report only if “the defendant is afforded an opportunity to present favorable evidence and to explain or rebut the adverse information.” State v. Mauro, 121 Idaho 178, 183, 824 P.2d 109 (1991).

The court’s concern regarding a jury’s role in making important moral decisions inherent in rendering a capital verdict is also overstated. Summerlin, 341 F.3d at 1113. In fact, because judges stand for election, they often understand and recognize the “link between contemporary community values and the penal system.” Id. Yet, the Ninth Circuit criticized the fact that judges stand for election and allegedly are more “apt to be influenced by external considerations when making their decisions.” Id. 341 F.3d at 1115. The accuracy of a death sentence may actually be diminished by jury participation, particularly in light of the complexity of defining statutory aggravating factors, mitigation

and the other pitfalls associated with capital sentencing. See United States v. Moss, 252 F.3d 993, 999 (8<sup>th</sup> Cir. 2001) (“Permitting a judge-found fact to affect the sentence imposed after a valid conviction, even if it is found under a more lenient standard, cannot be said to have resulted in a fundamentally unfair criminal proceeding”).

Further, a number of the concerns raised by the Ninth Circuit were premised upon Justice Breyer’s concurrence in Ring. However, Justice Breyer believes the Eighth Amendment mandates jury sentencing. Ring, 536 U.S. at 613-19. The majority’s opinion in Ring was based upon the Sixth Amendment and a holding that juries are required only to find statutory aggravating factors. Id. 536 U.S. at 609. Clearly, the concerns raised in Summerlin are not necessarily shared by a majority of the United States Supreme Court.

The Ninth Circuit also overlooked several key factors in reaching its decision. First, the opening paragraph in Ring explicitly linked capital and non-capital cases when it stated, “Capital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.” Ring, 536 U.S. at 589. In United States v Brown, 305 F.3d 304, 308 (5<sup>th</sup> Cir. 2002), the court recognized that in Apprendi, 530 U.S. at 475, the Supreme Court explained, “The *substantive* basis for New Jersey’s enhancement is thus not at issue; the adequacy of New Jersey’s procedure is.” (Emphasis in original). Based upon the link established in Ring, the Ninth Circuit’s attempt to distinguish Ring from Apprendi is unavailing. Apprendi is the basis for Ring. Therefore, “the substantive basis for [Idaho’s statutory aggravating factors] is thus not at issue; the adequacy of [Idaho’s] procedure is.”

Second, the Ninth Circuit ignored the language from Ring regarding harmless error. See 536 U.S. at 609 n.7 (“this Court ordinarily leaves it to lower courts to pass on the harmlessness of the error in the first instance”). If harmless error cannot be applied to Ring, as stated by the Ninth Circuit, the Supreme Court would have so stated and not remanded to Arizona for a determination of whether it exists.

Third, the Ninth Circuit failed to recognize that in Sanchez-Cervantes, 282 F.3d at 670, the court concluded that discussion subjecting Apprendi to harmless or plain error analysis, “lend[s] additional support to [the] determination that [*Ring*] is not a bedrock procedural rule.” In Hoffman v. Arave, 236 F.3d 523, 548 (9<sup>th</sup> Cir. 2001) (Pregerson, J., dissenting), the dissent expressly found that any error as a result of the jury not finding statutory aggravating factors beyond a reasonable doubt was harmless because the defendant failed to challenge one of the statutory factors found by the trial judge. Certainly, if Apprendi/Ring error is subject to plain error analysis, it cannot rise to the level of Teague’s second exception.

Fourth, the question of whether the rights identified in Apprendi are so “fundamental that any system of ordered liberty is obliged to include them,” was examined in Curtis v. United States, 294 F.3d 841, 843 (7<sup>th</sup> Cir. 2002). The court analyzed United States v. Cotton, 535 U.S. 625 (2002), concluding, “a decision about drug quantity made by a judge (on a preponderance standard) rather than a jury (on a reasonable-doubt standard) is not the sort of error that necessarily undermines the fairness, integrity, or public reputation of judicial proceedings.” Curtis, 294 F.3d at 843.

Finally, contrary to the Ninth Circuit’s opinion, Ring did not redefine Arizona’s capital murder law, but merely changed the entity that must make the finding regarding

statutory aggravating factors. Addressing this underlying theme from Summerlin, the Idaho Supreme Court has already rejected such a claim, albeit in a somewhat different context. In Lovelace, 2003 WL 21697869, at \*13-14, the supreme court addressed the question of whether the Ex Post Facto Clause permits a capital defendant to be resentenced to death under Idaho's new capital sentencing statutes. The court recognized that "[u]nder the new sentencing statutes, the state must prove the same aggravating circumstances required by the former statute and must prove them to a jury beyond a reasonable doubt." Id. at \*14. Therefore, the nature of the new changes, which were mandated by Ring, are procedural in nature, not substantive.

The state submits that the analysis in Summerlin is not well taken and should be rejected. If the rationale of Apprendi is strong enough to overrule a case decided a mere twelve years ago, that same rationale must be applied in the context of Teague. Neither Apprendi nor Ring implicates fundamental fairness and the accuracy of the criminal proceeding in the manner envisioned by the Supreme Court to qualify as a "watershed rule" under Teague's second exception.

D. Because The Claims Raised in Stuart's Successive Petition For Post-Conviction Relief Fail To Meet The Dictates Of I.C. § 19-2719(5), This Court Must Dismiss His Instant Successive Petition

1. Introduction

Stuart contends I.C. § 19-2719(5) has no application to his case because the claims raised in his instant successive post-conviction petition were allegedly raised on direct appeal. (Resp. in Opp., pp.38-43.) Stuart also makes several statutory and constitutional challenges to I.C. 19-2719(5). (Resp. in Opp., pp.44-46.)



However, Stuart has not only misconstrued the state's argument, but he has misinterpreted I.C. § 19-2719 and ignores the fact that the factual and legal basis for his challenge regarding jury sentencing in Stuart I, were significantly different than the basis for his present claims. Further, the Idaho Supreme Court has already rejected the vast majority of Stuart's statutory and constitutional challenges.

2. Because I.C. § 19-2719 Does Not Provide For the Retroactive Application Of New Rules Of Law In A Successive Post-Conviction Petition, Stuart's Successive Claims Must Be Dismissed

As detailed above, I.C. § 19-2719 does not permit the granting of post-conviction relief based upon the retroactive application of new rules of law. Therefore, Stuart's contention regarding the relitigation of claims raised on direct appeal is unavailing.

Stuart's contention that his present claims were previously raised in his direct appeal is also erroneous. As recognized by the Idaho Supreme Court in Stuart I, Stuart's claim in 1986, was based upon the Eighth Amendment and the argument that the jury should have participated in his sentencing. However, Stuart's present successive claims far exceed the 1986 claim. For example, Stuart challenges the lack of jury participation under the Sixth and Fourteenth Amendments. (Petition, p.8.) He also contends his constitutional rights were violated because he allegedly was not given notice in the charging document of the statutory aggravating factors and had no preliminary hearing regarding the statutory aggravating factors. (Petition, pp.8-9.) Stuart further contends the jury did not determine mens rea allegedly required under Enmund v. Florida, 458 U.S. 477 (1981). (Petition, p.9.) Stuart also contends the jury failed to find mitigating circumstances or conduct the weighing process. (Petition, pp.9-10.) Clearly, these were all claims that were known or reasonably could have been known when Stuart filed his

first post-conviction petition. His failure to timely raise the claims in his successive petition, including the new legal basis for the claims, constitutes waiver of the claims under I.C. § 19-2719(5).

Stuart's contention regarding the filing of an allegedly frivolous claim in his first post-conviction relief case is extraordinarily disingenuous. As Stuart's counsel is well aware, there is apparently no such thing as a "frivolous" claim in the context of capital litigation. Despite the United States Supreme Court's and Idaho Supreme Court's pronouncements regarding various legal aspects of capital litigation, capital defendants continually raise claims that have been repeatedly rejected by the courts. For example, in 1993, the United States Supreme Court concluded the statutory aggravating factor, "By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life," is constitutional. Arave v. Creech, 507 U.S. 463, 479 (1993). Despite the Supreme Court's pronouncement in Creech, several capital defendants continue to make constitutional challenges to this aggravating factor, including Creech. See e.g. State v. Creech, 132 Idaho 1, 11-12, 966 P.2d 1 (1998). Other statutory aggravating factors continue to be challenged despite the Idaho Supreme Court's pronouncement that they are constitutional. See e.g. State v. Sivak, 127 Idaho 387, 391-92, 901 P.2d 494 (1995). Despite the United States Supreme Court's and Idaho Supreme Court's prior holdings regarding jury sentencing, nearly every capital defendant asks the courts to reconsider their respective decisions. See e.g. State v. Porter, 130 Idaho 772, 795-96, 948 P.2d 127 (1997). In fact, the filing of "frivolous" claims has become so much a part of the normal course of procedure in capital cases, that the state is not permitted costs or attorney fees in post-conviction cases even if the claims are

“frivolous.” Creech, 132 Idaho at 23. Clearly, Stuart’s contention is without merit and must be rejected.

3. Application Of I.C. § 19-2719 To Stuart’s Case Does Not Constitute Retroactive Application In Violation Of State Law

Stuart correctly notes that Idaho law “prohibits the retroactive application of newly passed legislation.” Matthews v. State, 122 Idaho 801, 804, 839 P.2d 1215 (1992) (citing I.C. § 73-101). However, I.C. § 73-101 provides an exception, if the legislature expressly declares its intent to make a new rule of law retroactive. Id. At the time I.C. § 19-2719 was passed, the legislature expressly stated:

This act shall apply to all cases in which capital sentences were imposed on or prior to the effective date of this act but which have not been carried out, and to all capital cases arising after the effective date of this act.

1984 Idaho Sess. Laws 390.

Obviously, this language clearly states the legislature’s intent to make I.C. § 19-2719 retroactive to all capital cases. Because of this language, Stuart’s argument regarding retroactivity is without merit.

4. I.C. § 19-2719(5) Does Not Violate The Idaho Constitution’s Separation Of Powers Doctrine

Stuart’s contention regarding I.C. § 19-2719(5) allegedly violating Idaho’s separation of powers doctrine is the same as his contention regarding I.C. § 19-2719(5)(c). Because there is no logical distinction between the separation of powers doctrine analysis for I.C. § 19-2719(5) and I.C. § 19-2719(5)(c), the state adopts its argument above.

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5. Stuart Has Failed To Establish I.C. § 19-2719(5) Violates Ex Post Facto Laws

For the same reasons that I.C. § 19-2719(5)(c) does not violate ex post facto laws, the state submits I.C. § 19-2719(5) does not violate ex post facto laws.

6. I.C. § 19-2719(5) Does Not Violate Stuart's Due Process Or Equal Protection Rights

As detailed above, the Idaho Supreme Court has repeatedly rejected Stuart's claim that I.C. § 19-2719 violates equal protection or due process.<sup>4</sup> Therefore, Stuart's claim must be rejected.

E. Because Stuart Has Failed To Establish That State Non-Capital Retroactive Principles Apply To His Case, His Argument For Greater Retroactivity Principles Under Idaho Law Fails

Stuart contends that "[f]ederal retroactivity doctrine is the floor, not the ceiling" and that "states may provide greater retroactive effect than federal retroactivity doctrine." (Resp. in Opp., p.46.) However, because the Idaho Supreme Court has rejected applying greater retroactive effect than federal retroactivity doctrine in the context of capital cases, Stuart's argument fails.

In State v. Whitman, 96 Idaho 489, 491, 531 P.2d 579 (1975), the court explained:

The prospective or retrospective application of a decision is a discretionary determination of judicial policy made by the Court after balancing certain criteria. The Court must weight:

- (1) The purpose of the new rule;
- (2) Reliance on the prior decisions of this Court; and

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<sup>4</sup> In fact, if Stuart's case was not or is not a capital case, the state would submit, based upon the Idaho Supreme Court's repeated rejection of this claim, that it is frivolous and ask for appropriate sanctions.

(3) The effect of the new rule on the administration of justice.

Stuart contends these three criteria should be evaluated in determining whether Ring should be given retroactive effect. However, since at least the passage of I.C. § 19-2719, the Whitman criteria have never been applied in the context of a capital case and were implicitly rejected by the Idaho Supreme Court in State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991), and Fetterly.

In Card, the majority applied Payne v. Tennessee, 501 U.S. 808 (1991), which overruled in part, Booth v. Maryland, 482 U.S. 496 (1987). Card, 121 Idaho at 431-34. Justice Bistline, in dissent, contended that under Whitman, Payne should not be applied retroactively. Card, 121 Idaho at 461-63.

As described above, Fetterly sought retroactive application of the new rule of law from Charboneau. Relying upon I.C. § 19-2719, the Idaho Supreme Court rejected Fetterly's argument. Fetterly, 121 Idaho at 419. However, in dissent, Justice Bistline opined the majority improperly rejected the Whitman criteria for determining retroactivity. Id. 121 Idaho at 421-24.

By rejecting Justice Bistline's analysis in Card and Fetterly, and applying the dictates of I.C. § 19-2719, the Idaho Supreme Court has already rejected Stuart's argument regarding the application of Whitman.

F. I.C. § 19-2719 Does Not Unlawfully Suspend The Writ Of Habeas Corpus

Stuart attempts to salvage his successive post-conviction petition by alternatively characterizing it as a "Writ of Habeas Corpus." Because the UPCPA is the exclusive means for challenging the validity of a conviction or sentence, Stuart is precluded from

raising his Ring claims in the context of a writ of habeas corpus. Gomez v. State, 120 Idaho 632, 634, 818 P.2d 336 (Ct. App. 1991).

Stuart implicitly contends I.C. § 19-2719 unlawfully suspends the writ of habeas corpus by precluding petitioner from raising valid claims under Ring that invalidate his sentence. (Resp. in Opp., pp.50-52.) However, Stuart's counsel again fails to cite controlling cases expressly rejecting this claim. In McKinney v. State, 133 Idaho 695, 703, 992 P.2d 144 (1999), a capital petitioner raised the identical issue. Rejecting the claim, the Idaho Supreme Court explained:

We reject this argument, affirming the Court of Appeals' analysis of this issue in Eubank v. State, 130 Idaho 861, 863-64, 949 P.2d 1068, 1070-71 (Ct. App. 1997). All remedies in capital cases available by writ of habeas corpus or by post-conviction procedure must be pursued according to the procedures and the time limitations of I.C. § 19-2719. I.C. § 19-2719(4). The legislature may pass statutes regulating the use of the writ of habeas corpus. Mahaffey v. State, 87 Idaho 228, 231, 392 P.2d 279, 280 (1964). Post-conviction procedure acts have replaced the writ of habeas corpus for the purpose of challenging the validity of a conviction. See Dionne v. State, 93 Idaho 235, 237, 459 P.2d 1017, 1019 (1969). The proper use of a petition for post-conviction relief "avoids repetitious and successive applications; eliminates confusion and yet protects the applicant's constitutional rights." *Id.* Like the UPCPA, I.C. § 19-2719 does not deny the writ of habeas corpus. See *id.*; see also Eubank, 130 Idaho at 863-64, 949 P.2d at 1070-71.

Id., 133 Idaho at 703-04; McKinney v. Paskett, 753 F.Supp. 861, 864-65 (D. Id. 1990).

Further, as detailed in the state's Brief in Support of Motion to Dismiss Appeal, even if Stuart's successive petition could be raised in a petition for writ of habeas corpus, because the writ was filed in the wrong jurisdiction, his claims fail. (Brief in Support, p.12.) Stuart's claim is without merit and must be summarily rejected by this court.

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G. Equity Does Not Mandate The Retroactive Application Of *Ring*

Stuart contends, "Equitable principles alone demand that [his] death sentence be vacated." (Resp. in Opp., p.37.) Contrary to Stuart's contention, it is the retroactive application of *Ring* that would result in an inequitable result and miscarriage of justice.

In *Griffith*, a case involving the retroactive application of *Batson v. Kentucky*, 479 U.S. 79 (1986), the Supreme Court discussed the history and equities associated with the question of retroactivity. The Court explained, "'the Constitution neither prohibits nor requires retrospective effect,' of a new constitutional rule, and that a determination of retroactivity must depend on 'weigh[ing] the merits and demerits in each case.'" *Griffith*, 479 U.S. at 320 (quoting *Linkletter v. Walker*, 381 U.S. 618, 629 (1965)). The Court further noted the three-prong analysis adopted in *Linkletter* and *Stovall v. Denno*, 388 U.S. 293 (1967): "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Griffith*, 479 U.S. at 321 (quoting *Stovall*, 388 U.S. at 297). The Court explained that historically the three-prong analysis did not include cases "where a new rule is a 'clear break' with past precedent," even if the case was on direct review. *Griffith*, 479 U.S. at 324 (quoting *United States v. Johnson*, 457 U.S. 537, 549-50 (1982)). As explained in *United States v. Johnson*, 457 U.S. 537, 549-50 (1982) (internal quotes and citations omitted):

[W]here the Court has expressly declared a rule of criminal procedure to be a clear break with the past, it almost invariably has gone on to find such a newly minted principle nonretroactive. In this second type of case, the traits of the particular constitutional rule have been less critical than the Court's express threshold determination that the new constitutional interpretation so changes the law that prospectivity is arguably the proper course. Once the Court has found that the new rule was unanticipated, the second and third *Stovall* factors – reliance by law enforcement authorities

on the old standards and effect on the administration of justice of a retroactive application of the new rule – have virtually compelled a finding of nonretroactivity.

Reassessing the “clear break” exception, the Court concluded it should not be applied to cases on direct review. Griffith, 479 U.S. at 326-28.

In Teague, the Supreme Court again addressed the question of retroactivity, but in the context of collateral review.<sup>5</sup> Based upon the interests of comity and finality, a plurality of the Court concluded new constitutional rules of criminal procedure cannot be applicable in those cases which have become final before the new rules are announced. Id. 489 U.S. at 308-10. Specifically addressing the issue of finality, the Court explained:

Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions shows only that conventional notions of finality should not have as much place in criminal as in civil litigation, not that they should have none. If a criminal judgment is ever to be final, the notion of legality must at some point include the assignment of final competence to determine legality.

....

The costs imposed upon the States by retroactive application of new rules of constitutional law on habeas corpus generally far outweigh the benefits of this application. In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, for it continually forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards. . . . [S]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a habeas proceeding, new constitutional demands.

Id. at 309-10 (internal quotes, citations and emphasis omitted).

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<sup>5</sup> Interestingly, the question before the Court, again, involved the retroactive application of Batson v. Kentucky.

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Despite Stuart's protestations to the contrary, Ring is a new constitutional rule whose impact on the states is exactly as described in Teague, if it is applied retroactively to collateral cases. For nearly twenty years, Idaho's courts have relied upon an abundance of Supreme Court precedent clearly holding that a jury finding of statutory aggravating factors is not mandated by the Constitution. See Sivak, 105 Idaho at 904; Creech, 105 Idaho at 372-73; Charboneau, 116 Idaho at 145-48. To now require the application of Ring to those cases and potentially force the resentencing of every capital defendant in Idaho would seriously undermine any deterrent effect associated with the death penalty. More importantly, as explained in Teague, the entire operation of the criminal justice system would be seriously undermined because of the destruction of the principle of finality. Certainly, the costs associated with such a holding would be enormous and seriously outweigh any benefits associated with the new rule.

Based upon the principles of comity and finality, Stuart's argument regarding equity rings hollow.

### CONCLUSION

The state respectfully requests this court grant the state's Motion for Summary Dismissal and dismiss Stuart's successive Petition for Post-Conviction Relief.

DATED this 14<sup>th</sup> day of November, 2003.



L. LaMONT ANDERSON  
Deputy Attorney General  
Chief, Capital Litigation Unit

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**CERTIFICATE OF SERVICE**

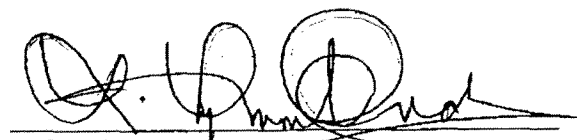
I HEREBY CERTIFY That on or about the 14<sup>th</sup> day of November, 2003, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

Joan M. Fisher  
Federal Defenders of  
Eastern Washington & Idaho  
201 N. Main  
Moscow, ID 83843

  X   U.S. Mail  
      Hand Delivery  
      Overnight Mail  
      Facsimile

Honorable Ron Schilling  
P.O. Box 1251  
Meridian, ID 83680-1251

  X   U.S. Mail  
      Hand Delivery  
      Overnight Mail  
      Facsimile

  
L. LaMont Anderson

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LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

MICHAEL A. HENDERSON  
Deputy Attorney General  
Chief, Criminal Law Division

2003 OCT 10 P 3: 27

SP02-109 ✓  
CASE NO. CL81-8495

L. LaMONT ANDERSON, ISB # 3687  
RALPH R. BLOUNT, ISB #5966  
KRISTINA M. SCHINDELE, ISB #6090  
Deputy Attorneys General  
Criminal Law Division, Capital Litigation Unit  
P.O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-2400

BY KL DEPUTY

JOHN SWAYNE, ISB #1985  
Clearwater County Prosecuting Attorney  
Box 2627  
Orofino, ID 83544  
Telephone: (208) 476-5611

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

GENE FRANCIS STUART,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

and

STATE OF IDAHO,

Plaintiff,

vs.

GENE FRANCIS STUART,

Defendant.

CASE NO. SP-02-00109

AFFIDAVIT IN SUPPORT OF  
MOTION FOR EXTENSION OF TIME

CASE NO. 8495

AFFIDAVIT IN SUPPORT OF  
MOTION FOR EXTENSION OF TIME

AFFIDAVIT IN SUPPORT OF MOTION FOR EXTENSION OF TIME - 1

00000261

STATE OF IDAHO     )  
                              ) ss:  
County of Ada         )

L. LaMont Anderson, being first duly sworn on oath, deposes and says:

1.     The state's responsive brief to Defendant/Petitioner's pending briefs is due October 10, 2003.

2.     An extension of time is necessary inasmuch as your affiant has had insufficient time in which to complete the necessary research and draft an appropriate responsive brief.

3.     Your affiant is primarily responsible for drafting the state's responsive brief. However, your affiant did not receive the court's ordering appointing the Idaho Attorney General's Office until September 29, 2003. While your affiant had every reason to believe the order would be signed, your affiant hesitated to expend a significant amount of time preparing to draft the responsive brief in the event the court declined to grant the petition for appointment.

4.     Additionally, even if the order had been signed and received earlier, because of a significant and unexpected increase in your affiant's case load, it has been impossible to complete the necessary review of Stuart's pending briefs and research and draft an appropriate response. Further, the Ninth Circuit, on September 2, 2003, issued an opinion in Summerlin v. Stewart, \_\_\_ F.3d \_\_\_, 2003 WL 22038399 (9<sup>th</sup> Cir. 2003) (en banc), that may have a direct impact on the issues raised in Stuart's successive post-conviction petition.

5.     Your affiant requests an extension of thirty-five (35) days, whereupon his brief would become due November 14, 2003.

*AFFIDAVIT IN SUPPORT OF MOTION FOR EXTENSION OF TIME - 2*

00000262

6. No previous extensions of time have been requested by your affiant in which to file his brief.

7. Your affiant contacted Stuart's counsel, Oliver W. Loewy, who informed your affiant that in light of Summerlin, he had no objection to the state's request.

8. This request is made in good faith and not with the intention of causing undue delay or tactical advantage.

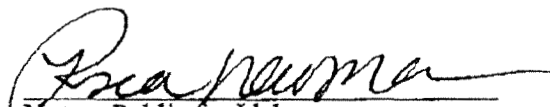
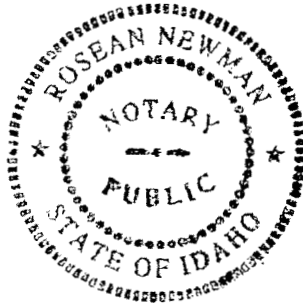
Further your affiant sayeth naught.

DATED this 10<sup>th</sup> day of October, 2003.



L. LaMONT ANDERSON  
Deputy Attorney General  
Chief, Capital Litigation Unit

SUBSCRIBED AND SWORN TO before me this 10<sup>th</sup> day of October, 2003.



Notary Public for Idaho  
Residing at: Boise, Idaho  
My Commission Expires: 10/22/04

**CERTIFICATE OF SERVICE**


I HEREBY CERTIFY That on or about the 10<sup>th</sup> day of October, 2003, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

Joan M. Fisher  
Federal Defenders of  
Eastern Washington & Idaho  
201 N. Main  
Moscow, ID 83843

  X   U.S. Mail  
      Hand Delivery  
      Overnight Mail  
      Facsimile

Honorable Ron Schilling  
P.O. Box 1251  
Meridian, ID 83680-1251

  X   U.S. Mail  
      Hand Delivery  
      Overnight Mail  
      Facsimile

  
L. LaMont Anderson

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

MICHAEL A. HENDERSON  
Deputy Attorney General  
Chief, Criminal Law Division

2003 OCT 10 P 3:27

CASE NO. SP02-109  
CR01-8495 ✓

L. LaMONT ANDERSON, ISB # 3687  
RALPH R. BLOUNT, ISB #5966  
KRISTINA M. SCHINDELE, ISB #6090  
Deputy Attorneys General  
Criminal Law Division, Capital Litigation Unit  
P.O. Box 83720  
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BY R DEPUTY.

JOHN SWAYNE, ISB #1985  
Clearwater County Prosecuting Attorney  
Box 2627  
Orofino, ID 83544  
Telephone: (208) 476-5611

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

GENE FRANCIS STUART,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

and

STATE OF IDAHO,

Plaintiff,

vs.

GENE FRANCIS STUART,

Defendant.

CASE NO. SP-02-00109

MOTION FOR EXTENSION OF TIME

CASE NO. 8495

MOTION FOR EXTENSION OF TIME

MOTION FOR EXTENSION OF TIME - 1

00000265

COME NOW, L. LaMont Anderson, Deputy Attorney General, Chief, Capital Litigation Unit and Special Prosecuting Attorney for Clearwater County, State of Idaho, and John A. Swayne, Prosecuting Attorney for Clearwater County, State of Idaho, and do hereby move this Court for an order extending the time in which the state's "responsive brief to Defendant/Petitioner's pending briefs" will be due until November 14, 2003. This motion is based on the affidavit of the undersigned attorney. Said affidavit is attached hereto and incorporated by reference herein.

DATED this 10<sup>th</sup> day of October, 2003.

A handwritten signature in black ink, appearing to read 'L. LaMont Anderson', is written over a horizontal line.

L. LaMONT ANDERSON  
Deputy Attorney General  
Chief, Capital Litigation Unit



**CERTIFICATE OF SERVICE**


I HEREBY CERTIFY That on or about the 10<sup>th</sup> day of October, 2003, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

Joan M. Fisher  
Federal Defenders of  
Eastern Washington & Idaho  
201 N. Main  
Moscow, ID 83843

<u>  X  </u>	U.S. Mail
<u>     </u>	Hand Delivery
<u>     </u>	Overnight Mail
<u>     </u>	Facsimile

Honorable Ron Schilling  
P.O. Box 1251  
Meridian, ID 83680-1251

<u>  X  </u>	U.S. Mail
<u>     </u>	Hand Delivery
<u>     </u>	Overnight Mail
<u>     </u>	Facsimile

  
L. LaMont Anderson

FILED 12/23/03  
3:39 PM  
LEWISTON, IDAHO  
BY CRB

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

GENE FRANCIS STUART,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Defendant-Respondent.

Case No.: 8495

ORDER FOR ATTORNEY'S FEES

IT IS HEREBY ORDERED that the fees in this matter in the amount of \$270.00 at  
the rate of \$100.00 per hour be and the same hereby are approved and payable to Randall,  
Blake & Cox, P.A.

DATED THIS 23<sup>rd</sup> day of December, 2003.

CRB  
DISTRICT JUDGE

## 0046 24 0 4:02

) CASE NO SP-02-00109  
) BY SIG DEPUTY  
) NOTICE OF HEARING

TELEPHONIC SCHEDULING CONFERENCE,..... 03/03/2004 at 3:00:PM - Pacific  
 Judge: RON SCHILLING  
 Courtroom: DISTRICT COURTROOM  
 4:00 P.m. - Mtn.  
 Time

Lament Anderson  
Deputy A.G. - mailed

Dated FEBRUARY 26, 2004  
ROBIN CHRISTENSEN  
CLERK OF THE DISTRICT COURT  
By Sue K. Sammerton  
Deputy Clerk

IN AND FOR THE COUNTY OF CLEARWATER  
150 ICHIGAN AVENUE/PO BOX 586  
OROFINO, IDAHO 83544

STATE OF IDAHO,

Plaintiff,

vs.

GENE FRANCIS STUART

OROFINO, ID 83544

Defendant.

DOB: UNKNOWN

DL OR SSN: UNKNOWN

2004 Feb 26 10:53

CASE NO CR-81-08495

BY SIC DEPUTY

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the above-entitled case is set for:

TELEPHONIC SCHEDULING CONFERENCE..... 03/03/2004 at 3:00:PM

Judge: RON SCHILLING

Courtroom: DISTRICT COURTROOM

*Pacific  
4:00 P.M. mtn.  
Time*

*Q.W. Co. will  
initiate call*

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on this date: FEBRUARY 26, 2004

Defendant: GENE FRANCIS STUART

Mailed \_\_\_\_\_ Hand Delivered \_\_\_\_\_

Private Counsel: Mailed \_\_\_\_\_ Hand Delivered \_\_\_\_\_

JOAN M. FISHER & *Oliver Loewy*  
FEDERAL DEFENDERS OF EASTERN WASHINGTON & IDAHO  
201 N. MAIN  
MOSCOW, ID 83843

Prosecutor: JOHN A SWAYNE &

Mailed \_\_\_\_\_ Hand Delivered \_\_\_\_\_

Officer: PROSECUTING ATTY

Mailed \_\_\_\_\_ Hand Delivered \_\_\_\_\_

Dated FEBRUARY 26, 2004

ROBIN CHRISTENSEN

CLERK OF THE DISTRICT COURT

By

*Sue K. Symmerton*

Deputy Clerk

NOTICE OF HEARING

DOC22 - 7/96

00000270

**JOAN M. FISHER**

Capital Habeas Unit

Federal Defenders of Eastern Washington &amp; Idaho

201 North Main Street

Moscow, Idaho 83843

Telephone: 208-883-0180

Facsimile: 208-882-1492

FORWARDED TO THE  
CLERK OF DISTRICT COURT  
BY \_\_\_\_\_

2004 MAR -2 PM 4:48

SP02-109  
SP02-151  
CL81-8495  
BY SKS DEPUTY

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

**Gene Francis Stuart,****Petitioner,****vs.**

**STATE OF IDAHO, and  
TOM BEAUCLAIR, Director, Idaho  
Department of Correction, and  
GREG FISHER, Warden, Idaho  
Maximum Security Institution.**

**Respondent.****CAPITAL CASE**

**CASE NOS. SP02-109,  
8495, &  
SP02-151**

**AFFIDAVIT IN SUPPORT OF  
MOTION TO STAY PROCEEDINGS  
PENDING DISPOSITION IN THE  
IDAHO SUPREME COURT OF  
HOFFMAN v. STATE AND IN THE  
UNITED STATES SUPREME COURT  
OF SCHRIRO v. SUMMERLIN**

I, Joan M. Fisher, declare the following under penalty of perjury:

1. Because resentencing proceedings would be expensive, lengthy, and complex, sentencing relief in this case would likely lead the parties to consider resolving Petitioner's entire case short of additional litigation. Thus, moving forward on these matters before dispositions in *Schriro v. Summerlin*, 124 S.Ct. 833 (2003) (*certiorari* review granted), and *Hoffman v. State*, Case Nos. 29354/29355 (Idaho S.Ct. 2003) (appeals from denials

Affidavit In Support Of Motion To Stay -1

00000271

of *Ring* relief in 19 I.C. §2719 petition and I.C.R. 35 motion), may be wasteful.

Additionally, it would be consistent with Idaho Supreme Court and federal court orders in the *Ring* context.

2. Petitioner, who stands convicted of first degree murder (Idaho Code Section 18-4001 & 4003 (1977)) and is under sentence of death for that offense, has three matters pending before this Court. In two of these matters, Petitioner seeks sentencing relief through the application of *Ring v. Arizona*, 122 S. Ct. 2428, 2432 (2002), to his case.<sup>1</sup> In the third, he seeks, among other things, sentencing relief on factually complex non-*Ring* grounds.<sup>2</sup>
3. In *Ring*, the United States Supreme Court held as a matter of federal constitution law that a jury must determine the existence of each fact necessary to render a defendant eligible for a sentence of death. The Idaho Supreme Court has acknowledged that *Ring* invalidates the statutory scheme under which Mr. Stuart was sentenced to death. *State v. Fetterly*, 137 Idaho 729, 52 P.3d 874, 875 (2002) (holding that *Ring* "appears to invalidate the death penalty scheme in Idaho which to this time has allowed the sentencing judge to make factual findings of the aggravating factors necessary to the imposition of a death sentence.").
4. Thus, if *Ring* is found retroactively applicable in *Summerlin* or *Hoffman*, Petitioner will be legally entitled to vacation of his death sentence. Respondent has acknowledged this

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<sup>1</sup>Petition For Post-Conviction Relief And/Or Writ Of Habeas Corpus, Case Number SP-02-00109, and Motion To Correct Illegal Sentence, To Vacate Sentence Of Death And For New Sentencing Trial, Case Number 8495.

<sup>2</sup>Petition For PostConviction Relief And Petition For Writ Of Habeas Corpus, Case Number SP02-151. *See id.* at 7-8 (Claim A: prosecutorial misconduct mandates new sentencing proceedings) and 18-19 (Claim C: *Brady* violations require new sentencing proceedings).

entitlement in the case of a similarly situated death sentenced prisoner. Specifically, in oral argument before the Idaho Supreme Court in *Hoffman*, Respondent stated that if *Ring* is found retroactively applicable the State will "have no other choice...in the interest of fairness" than to concede that resentencing proceedings are mandated.<sup>3</sup>

5. The United States Supreme Court has granted *certiorari* review to decide whether federal law requires the retroactive application of *Ring* to cases where the direct appeal was final before *Ring* was announced. *Schriro v. Summerlin*, No. 03-526.
6. Even if federal law does not require retroactive application of *Ring*, Idaho state law may do so. Of the several cases raising before the Idaho Supreme Court the question of *Ring*'s retroactivity, the only case fully briefed and argued is *Hoffman* and the Supreme Court has stayed that matter pending disposition in *Summerlin*. *Hoffman v. State*, Order Suspending Appeal, Case Nos. 29354/29355 (Idaho 2/12/2004). While the Supreme

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<sup>3</sup>The following exchange took place during oral argument before the Idaho Supreme Court on February 9, 2004:

Justice Trout: . . . If...the U.S. Supreme Court did decide [*Ring*] was retroactive, why I guess at that point in time...the State would concede then as I understand it that [Appellant Hoffman] should be resentenced at that point?

Asst. A.G. Anderson: Your Honor, I don't believe that we'd have any other choice... But in the interest of fairness, I can't quite frankly can't envision the scenario where the State would not say you have to be resentenced.

This quotation is taken from the Idaho Supreme Court audio tapes of the oral argument, not from an official transcript.

Court has not stayed all cases raising the issue of *Ring*'s retroactivity, it has stayed some<sup>4</sup> and, in any event, no case other than *Hoffman* which raises the question has been fully briefed and/or argued before that court.

7. The Federal District Court for the District of Idaho has stayed proceedings in many habeas corpus cases filed on behalf of death sentenced prisoners pending the Idaho Supreme Court's decision as to whether it will apply *Ring* retroactively on collateral review, where the cases were not already stayed on other grounds. See, *Rhoades v. Arave*, Case No. CV 93-156-S-EJL (6/30/03); *Rhoades v. Arave*, Case No. CV 93-155-S-EJL (6/30/03); *Creech v. Paskett*, Case No. CV 99-0224-S-BLW (5/20/03); *Fields v. Klauser*, Case No. CV 95-422-S-EJL (6/30/03); *McKinney v. Paskett*, Case No. CV 96-177-S-EJL; *Row v. Miller*, CV 98-240-S-BLW (6/9/03); and *Sivak v. Klauser*, CV-96-0056-S-BLW (6/9/03).
8. The Ninth Circuit Court of Appeals, too, has stayed proceedings in an Idaho case pending final disposition by the United States Supreme Court of *Summerlin* and the Idaho state courts' final disposition of state postconviction proceedings based upon *Ring* in *Hoffman*. *Hoffman v. Arave*, Orders (Nos. 02-99004, 10/10/2002 & 02-99005, 10/17/2003). Likewise, the Ninth Circuit has stayed proceedings in the case of an Idaho death sentenced prisoner pending "final disposition of *Summerlin* by the United States Supreme

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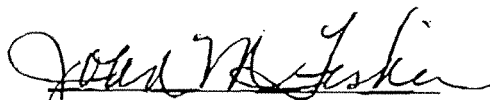
<sup>4</sup>See, e.g., *Rhoades v. State*, Case Nos. 29180/29212 (Idaho 12/18/03); *McKinney v. State*, Order Granting Motion To Suspend Appeal, Case Nos. 26269/29411 (Idaho 1/16/04); *State v. Sivak*, Order Granting Motion To Suspend Appeal, Case Nos. 29662/29663 (Idaho 1/20/04); *State v. Creech*, Order Granting Motion To Suspend Appeal, Case Nos. 29681/29682 (Idaho 1/20/04); *Hairston v. State*, Order Granting Motion To Suspend Proceedings In Appeal, Case Nos. 28528/29653/29680 (Idaho 2/24/04).



Court." *Pizzuto v. Arave*, 345 F.3d 1119 (9<sup>th</sup> Cir. 2003).

9. Thus, staying these proceedings pending disposition in *Summerlin* and the *Hoffman* cases may preserve judicial resources and would be consistent with Idaho Supreme Court and federal court orders.

Dated this 20 day of March, 2004.



Joan M. Fisher

Attorney for Petitioner Gene F. Stuart

00000276

SP02-151  
 CR81-8495  
 SP02-109  
 at \_\_\_\_\_ o'clock \_\_\_\_\_ M  
 Robin Christensen  
 By SSG Clerk  
 Deputy

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE  
 OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER .

GENE FRANCIS STUART	)	CASE NO. CR81-8495, SP02-00109,
	)	SP02-00151
Plaintiff,	)	
	)	COURT MINUTES
Vs.	)	
	)	
STATE OF IDAHO, ET. AL.	)	
	)	
Defendant.	)	

District Judge Presiding: Ron Schilling  
 Joan Fisher and Oliver Lowery: Attorneys for Plaintiff  
 John A. Swayne and Lamont Anderson: Attorneys for Defendant  
 Deputy Clerk: Sue K. Summerton  
 Date: Scheduling conference 3/3/04  
 Tape: C3656

=====

FOOTAGE:

- 818 Parties present telephonically: Honorable Ron Schilling; Oliver Lowey and Lamont Anderson. John Swayne present in court. Joan Fisher not present. Court advises now is the time for a scheduling conference. Court advises receipt of Plaintiff's Motion and Affidavit to stay.
- 908 Mr. Lowey argues the Motion to Stay.
- 932 Court questions Mr. Anderson and Mr. Swayne regarding their position.
- 941 Mr. Anderson argues in opposition to Motion to Stay.
- 1036 Mr. Lowey continues argument to Motion to Stay.
- 1162 Mr. Anderson continues argument.

Deputy Clerk – Sue K. Summerton  
 COURT MINUTES – 1

Approved:   
 District Judge

00000277

GENE F. STUART  
CR81-8495  
SP02-109  
SP02-151


1220 Mr. Lowery continues argument.

1247 Court remarks to attorneys. Court advises that after review of the motion and argument from the attorneys that the motion to stay is granted. Court stays these cases until either party, for good cause, notifies the court of another consideration. Court orders Mr. Lowey to prepare an order rendering this opinion.

1404 Court in recess.

Deputy Clerk – Sue K. Summerton  
COURT MINUTES – 2

Approved: \_\_\_\_\_

  
District Judge

00000278

**JOAN M. FISHER**

Capital Habeas Unit

Federal Defenders of Eastern Washington &amp; Idaho

201 North Main Street

Moscow, Idaho 83843

Telephone: 208-883-0180

Facsimile: 208-882-1492

CLERK OF DISTRICT COURT  
CLERK OF DISTRICT COURT

2004 MAR -2 P 4:48

SP02-109

CASE NOS. SP02-151

CR81-8495

BY SK8 DEPUTY**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

Gene Francis Stuart,

Petitioner,

vs.

STATE OF IDAHO, and  
TOM BEAUCLAIR, Director, Idaho  
Department of Correction, and  
GREG FISHER, Warden, Idaho  
Maximum Security Institution.

Respondent.

CAPITAL CASE

CASE NOS. SP02-109,  
8495, &  
SP02-151MOTION TO STAY PROCEEDINGS  
PENDING DISPOSITION IN THE  
IDAHO SUPREME COURT OF  
*HOFFMAN v. STATE* AND IN  
THE UNITED STATES SUPREME  
COURT OF *SCHRIRO v. SUMMERLIN*


Petitioner, Gene Francis Stuart, moves to stay these proceedings pending the outcomes in cases now before the Idaho Supreme Court (*Hoffman v. State*, Case Nos. 29354-/29355) and the United States Supreme Court (*Schriro v. Summerlin*, Case No. 03-526), in which the dispositive issues are identical to issues raised before this Court. Specifically, common to *Summerlin* and Petitioner's cases is the question whether *Ring v. Arizona*, 122 S.Ct. 2428 (2002), should be applied as a matter of federal law to cases in which direct appeal proceedings were complete before *Ring* was decided, while common to *Hoffman* and Petitioner's cases are (1) the same

Motion To Stay Proceedings -1

00000279

question just noted regarding *Summerlin* and (2) whether *Ring* should be applied as a matter of state law to cases in which direct appeal proceedings were complete before *Ring* was decided. Because resentencing proceedings would be expensive, lengthy, and complex, sentencing relief in this case would likely lead the parties to consider resolving Petitioner's entire case short of additional litigation. Thus, moving forward on these matters before dispositions in *Summerlin* and *Hoffman* may be wasteful. Additionally, staying these proceedings would be consistent with Idaho Supreme Court and federal court orders in the *Ring* context.

Dated this 24 day of March, 2003.



Joan M. Fisher

Attorney for Petitioner Gene F. Stuart

CERTIFICATE OF SERVICE

I hereby certify that on the 2<sup>nd</sup> day of March, 2003, I caused to be served a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, addressed to:

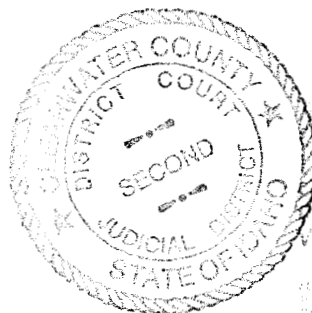
L. LaMont Anderson  
Deputy Attorney General  
Chief, Capital Litigation Unit  
P.O. Box 83720  
Boise ID 83720-0010  
(f) 208-334-2942

☒ US Mail  
☐ Hand Delivery  
☒ Facsimile  
☐ Federal Express

John A. Swayne  
Clearwater County Prosecutor's Office  
P.O. Box 2627  
Orofino, Idaho 83544  
(f) 208-476-9710

☒ US Mail  
☐ Hand Delivery  
☒ Facsimile  
☐ Federal Express

Deborah L. Hwang



STATE OF IDAHO  
County of Clearwater  
I hereby certify that the foregoing is a full, true, and correct copy of an instrument as the same now remains on file and of record in my office  
WITNESS my hand and official seal hereto affixed  
on 2<sup>nd</sup> day of March A.D., 2004  
ROBIN CHRISTENSEN, CLERK OF THE DISTRICT COURT EX OFFICIO AUDITOR & RECORDER

Motion To Stay Proceedings -3

By Deputy Sue K. Summerton

00000281

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
IDAHO

2004 MAR 17 P 12:57

Gene Francis Stuart,

Petitioner,

vs.

STATE OF IDAHO, and  
TOM BEAUCLAIR, Director, Idaho  
Department of Correction, and  
GREG FISHER, Warden, Idaho  
Maximum Security Institution.

Respondent.

CAPITAL CASE

CASE NO. \_\_\_\_\_

CASE NOS. ~~SP02-109~~ BY W2002-0000443

8495, &

~~SP02-151~~ W2002-0000473

DEPUTY

ORDER STAYING PROCEEDINGS  
PENDING DISPOSITION IN THE  
IDAHO SUPREME COURT OF  
*HOFFMAN v. STATE* AND IN  
THE UNITED STATES SUPREME  
COURT OF *SCHRIRO v. SUMMERLIN*

Having duly considered Petitioner's application to stay each of these three proceedings  
and, on March 3, 2004, having heard and considered oral argument addressing the application, it  
is hereby ordered that:

Proceedings in each of these cases are hereby stayed pending  
disposition in the Idaho Supreme Court of *Hoffman v. State*,  
Case Nos. 29354/29355, and in the United States Supreme  
Court of *Schriro v. Summerlin*, Case No. 03-526. In the  
interim, either party may move to dissolve the stay in either  
case for good cause.

Dated this 15<sup>th</sup> day of March, 2004.

  
Ronald D. Schilling  
Idaho District Court Judge



Second Judicial District Court, State of Idaho  
In and For the County of Clearwater  
150 Michigan Ave  
Orofino, Idaho 83544

STATE OF IDAHO,  
Plaintiff.

vs.

Gene Francis Stuart

Orofino, ID 83544

Defendant.

DOB:

DL or SSN:

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2005 DEC 23 A 9:38

CASE NO. \_\_\_\_\_  
Case No: CR-1981-0008495

BY Stu DEPUTY  
**NOTICE OF HEARING**

**NOTICE IS HEREBY GIVEN** that the above-entitled case is hereby set for:

Telephonic Status Conference  
Judge: Ron Schilling

Friday, January 06, 2006

10:00 AM  
Pacific

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on this date Friday, December 23, 2005.

Defendant: Gene Francis Stuart

Mailed \_\_\_\_\_ Hand Delivered \_\_\_\_\_

Private Counsel:

Mailed X Hand Delivered \_\_\_\_\_

Joan M. Fisher / Oliver Coe  
Federal Defenders Of Eastern Washington & Idaho  
201 N. Main  
Moscow ID 83843

Prosecutor: Lori Gilmore / Lamont Anderson

Mailed X Hand Delivered X

Dated: Friday, December 23, 2005

Robin Christensen  
Clerk Of The District Court

By:

Sue K. Summerhays  
Deputy Clerk  
DOC22 7/96

00000283

SECOND JUDICIAL DISTRICT COURT, STATE OF IDAHO  
IN AND FOR THE COUNTY OF CLEARWATER  
150 MICHIGAN AVE  
OROFINO, IDAHO 83544

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

Gene Francis Stuart, Plaintiff

vs

State Of Idaho, Defendant

Case No: ~~2005-0002~~ 2005-0000443 A 9: 35

NOTICE OF HEARING

BY SJS DEPUTY

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Telephonic Status Conference  
Judge:

Friday, January 06, 2006  
Ron Schilling

10:00 AM Pacific

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on December 23rd, 2005.

Oliver Lowry  
JOAN M. FISHER  
201 N. MAIN  
MOSCOW ID 83843

X Mailed \_\_\_\_\_ Hand Delivered

Dated: December 23rd, 2005  
Robin Christensen  
Clerk Of The District Court

By: Sue K. Swinerton  
Deputy Clerk

DOC22cv 7/96

NOTICE OF HEARING

00000284

SECOND JUDICIAL DISTRICT COURT, STATE OF IDAHO  
IN AND FOR THE COUNTY OF CLEARWATER  
150 MICHIGAN AVE  
OROFINO, IDAHO 83544

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

Gene Francis Stuart, Plaintiff

vs

State Of Idaho, Defendant

Case No: CV-2005-DEC-000743 A 9:35

NOTICE OF HEARING

BY Sgt DEPUTY

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Telephonic Status Conference  
Judge:

Friday, January 06, 2006  
Ron Schilling

10:00 AM Pacific

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on December 23rd, 2005.

L. LAMONT ANDERSON  
P.O. BOX 7129  
BOISE ID 83707-1129

☒ Mailed ☐ Hand Delivered

Dated: December 23rd, 2005  
Robin Christensen  
Clerk Of The District Court

By: Sue K. Sommerston  
Deputy Clerk

DOC22cv 7/96

NOTICE OF HEARING

00000285

SECOND JUDICIAL DISTRICT COURT, STATE OF IDAHO  
IN AND FOR THE COUNTY OF CLEARWATER  
150 MICHIGAN AVE  
OROFINO, IDAHO 83544

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

Gene Francis Stuart, Plaintiff

vs

State Of Idaho, Defendant

)  
) Case No: CV-2002-000043 A 9:35  
)

) NOTICE OF HEARING  
)

BY SJS DEPUTY

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Telephonic Status Conference  
Judge:

Friday, January 06, 2006  
Ron Schilling

10:00 AM  
Pacific

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on December 23rd, 2005.

LORI GILMORE  
P.O. BOX 2627  
OROFINO ID 83544

       Mailed X Hand Delivered

Dated: December 23rd, 2005  
Robin Christensen  
Clerk Of The District Court

By: Sue K. Summerton  
Deputy Clerk

DOC22cv 7/96

NOTICE OF HEARING

00000286

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

STEPHEN A. BYWATER  
Deputy Attorney General  
Chief, Criminal Law Division

L. LaMONT ANDERSON, ISB # 3687  
Deputy Attorney General  
Criminal Law Division, Capital Litigation Unit  
P.O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-4539

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2005 DEC 27 A 11:33

CASE NO.

CV02-443  
CR81-8495

BY

SL

DEPUTY

ORIGINAL

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

GENE FRANCIS STUART,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

and

STATE OF IDAHO,

Plaintiff,

vs.

GENE FRANCIS STUART,

Defendant.

CASE NO. CV 2002-0000443

MOTION TO LIFT STAY

CASE NO. CR81-0008495

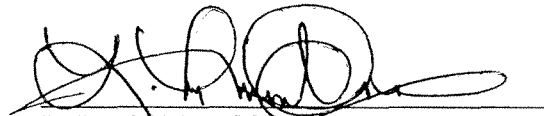
MOTION TO LIFT STAY

COMES NOW, L. LaMont Anderson, Deputy Attorney General, Chief, Capital Litigation Unit and Special Prosecuting Attorney for Clearwater County, State of Idaho, and does hereby request this court to lift the stay imposed on March 17, 2004.

In the March 17, 2004, Order, this Court granted Petitioner's Motion to Stay Proceedings pending the dispositions in Hoffman v. State, #29354/29355 and Schriro v. Summerlin, # 03-526. On September 14, 2005, pursuant to I.C. § 19-2719, the Idaho Supreme Court issued an opinion dismissing the appeal in Hoffman v. State, --- Idaho ---, 121 P.3d 958 (2005). The Remittitur has been issued. On June 24, 2004, the United States Supreme Court issued an opinion in Schriro v. Summerlin, 542 U.S. 348 (2004).

Because the underlying bases for this court's order staying the instant case has now been concluded, the state respectfully requests that the stay be lifted and a scheduling order be entered to complete the litigation in the instant case.

DATED this 22<sup>nd</sup> day of December, 2005.

  
L. LaMONT ANDERSON  
Deputy Attorney General  
Chief, Capital Litigation Unit

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on or about the 22<sup>nd</sup> day of December, 2005, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

Joan M. Fisher  
Federal Defenders of  
Eastern Washington & Idaho  
317 W. 6<sup>th</sup> Street, Suite 204  
Moscow, ID 83843


  X   U.S. Mail  
       Hand Delivery  
       Overnight Mail  
       Facsimile

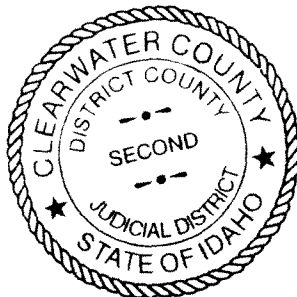
Honorable Ron Schilling  
P.O. Box 1251  
Meridian, ID 83680-1251

  X   U.S. Mail  
       Hand Delivery  
       Overnight Mail  
       Facsimile

Lori Gilmore  
Clearwater County Prosecutor  
Box 2627  
Orofino, ID 83544

  X   U.S. Mail  
       Hand Delivery  
       Overnight Mail  
       Facsimile

  
L. LaMont Anderson



STATE OF IDAHO      County of Clearwater  
I hereby Certify that the foregoing is a full, true, and  
correct copy of an instrument as the same now  
remains on file and of record in my office.

WITNESS my hand and official seal hereto affixed  
this 29<sup>th</sup> day of Dec AD. 2005

ROBIN CHRISTENSEN, CLERK OF THE DISTRICT  
COURT EX OFFICIO AUDITOR & RECORDER

by Deputy Sue K. Sumner

CV 81-2495  
CV 2-443  
CV 2-173  
JAN 06 10:08  
SJS

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE  
OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

GENE FRANCIS STUART	)	CASE NO. CV2002-00443,
	)	CV2002-00473
Plaintiff,	)	
	)	COURT MINUTES
Vs.	)	
	)	
STATE OF IDAHO, ET. AL.	)	
	)	
Defendant.	)	
<hr/>		
STATE OF IDAHO,	)	CASE NO. CR1981-008495
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
GENE FRANCIS STUART,	)	
	)	
Defendant.	)	
<hr/>		

District Judge Presiding: Ron Schilling  
Joan Fisher and Oliver Lowery: Attorneys Gene Stuart  
Lamont Anderson and Lori Gilmore: Attorneys for the State  
Deputy Clerk: Sue K. Summerton  
Date: 1/6/06 Tape: C3741 Time: 10:10 a.m.  
Subject of Proceeding: Telephonic Status Conference

=====

FOOTAGE:

- 001 Court advises Ms. Fisher, Mr. Lowey, Mr. Anderson, and the court are present telephonically and Ms. Gilmore was present in person. Court advises that this matter will be recorded but not reported. Court advises now is the time to hear the motion to lift stay.
- 25 Mr. Lowey has no objection to lift the stay and moves to submit a brief to the court.
- 31 Court grants motion to lift the say and for supplemental briefs.

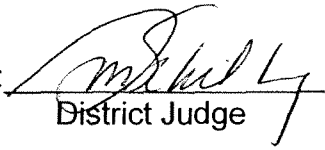
COURT MINUTES – 1

00000290



- 44 Mr. Lowey moves for 1 month to file brief.
- 56 Mr. Anderson has no objection to 1 month for filing of brief.
- 64 Court orders Mr. Lowey to file his brief by 2/3/06 and that any time there is a filing please send a courtesy copy to the court at his Meridian, Idaho address.
- 89 Ms. Fisher moves for more time to file the brief.
- 100 Court grants motion and continues deadline to 2/10/06. Court questions Ms. Gilmore.
- 110 Ms. Gilmore responds.
- 129 Mr. Anderson moves for his brief be due 3/10/06.
- 151 Court questions the attorneys regarding the 3 pending cases.
- 154 Mr. Lowey clarifies the issues pending.
- 167 Mr. Anderson responds.
- 194 Colloquy between the Court, Mr. Anderson and Mr. Lowey regarding pending issues.
- 286 Mr. Lowey moves to set a briefing schedule hearing.
- 309 Court grants motion and orders the briefs dues a follows: Petitioner/Defendant's brief is due 2/10/06 and the Respondent/Plaintiff's brief is due 3/10/06. Court sets a telephonic scheduling conference for 3/30/06 at 10:00 a.m. pacific time, to set an oral argument hearing.
- 410 Mr. Anderson remarks regarding an order appointing Mr. Lowey in the post conviction cases.
- 428 Court orders Mr. Lowey to review the files for a specific order and if one is not located, he is to prepare one.
- 450 Court in recess.

COURT MINUTES – 2

Approved: 

District Judge

00000291

SECOND JUDICIAL DISTRICT COURT, STATE OF IDAHO  
IN AND FOR THE COUNTY OF CLEARWATER  
150 MICHIGAN AVE  
OROFINO, IDAHO 83544

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

Gene Francis Stuart, Plaintiff

vs

State Of Idaho, Defendant

)  
) Case No: CV-2002-0000443  
)

) NOTICE OF HEARING  
)

2006 JAN 23 A 8:48

CASE NO \_\_\_\_\_  
BY S/S DEPUTY

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Telephonic Scheduling Conference Thursday, March 30, 2006  
Judge: Ron Schilling

10:00 AM

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on January 23rd, 2006.

OLIVER LOEWY  
317 W. SIXTH STREET, SUITE 204  
MOSCOW ID 83843

☒ Mailed ☐ Hand Delivered

Dated: January 23rd, 2006  
Robin Christensen  
Clerk Of The District Court

By:

Sue K. Summerton  
Deputy Clerk

DOC22cv 7/96

NOTICE OF HEARING

00000292

SECOND JUDICIAL DISTRICT COURT, STATE OF IDAHO  
IN AND FOR THE COUNTY OF CLEARWATER  
150 MICHIGAN AVE  
OROFINO, IDAHO 83544

CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

Gene Francis Stuart, Plaintiff

vs

State Of Idaho, Defendant

Case No: CV-2002-0000443

2006 JAN 23 A 8:48

NOTICE OF HEARING

BY SKG DEPUTY

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Telephonic Scheduling Conference Thursday, March 30, 2006  
Judge: Ron Schilling

10:00 AM

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on January 23rd, 2006.

JOAN M. FISHER  
317 W. SIXTH STREET, SUITE 204  
MOSCOW ID 83843

☒ Mailed ☐ Hand Delivered

Dated: January 23rd, 2006  
Robin Christensen  
Clerk Of The District Court

By: Sue K. Summerton  
Deputy Clerk

DOC22cv 7/96

NOTICE OF HEARING

00000293

00000294

SECOND JUDICIAL DISTRICT COURT, STATE OF IDAHO  
IN AND FOR THE COUNTY OF CLEARWATER  
150 MICHIGAN AVE  
OROFINO, IDAHO 83544

Gene Francis Stuart, Plaintiff

vs

State Of Idaho, Defendant

)  
)  
)  
)  
)

Case No: CV-2002-0000443

NOTICE OF HEARING

Case No

BY SK DEPUTY

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2006 JAN 23 A 8:49

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Telephonic Scheduling Conference Thursday, March 30, 2006  
Judge: Ron Schilling

10:00 AM

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on January 23rd, 2006.

L. LAMONT ANDERSON  
P.O. BOX 7129  
BOISE ID 83707-1129

X Mailed \_\_\_\_\_ Hand Delivered

Dated: January 23rd, 2006  
Robin Christensen  
Clerk Of The District Court

By:

Sue K. Summerlin  
Deputy Clerk

DOC22cv 7/96

NOTICE OF HEARING

00000295

Second Judicial District Court, State of Idaho  
And For the County of Clearwater  
150 Michigan Ave  
Orofino, Idaho 83544

STATE OF IDAHO,  
Plaintiff.

vs.

Gene Francis Stuart

Orofino, ID 83544

Defendant.

DOB:

DL or SSN:

CLERK - DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2006 JAN 23 A 8:38

Case No: ~~CR-1981-0008495~~

NOTICE OF HEARING

DEPUTY

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Telephonic Scheduling Conference Thursday, March 30, 2006 10:00 AM  
Judge: Ron Schilling

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on this date Monday, January 23, 2006.

Defendant: Gene Francis Stuart

Mailed \_\_\_\_\_ Hand Delivered \_\_\_\_\_

Private Counsel:

Mailed X Hand Delivered \_\_\_\_\_

Joan M. Fisher & Oliver Lowey  
Federal Defenders Of Eastern Washington & Idaho  
317 W. Sixth Street, Suite 204  
Moscow ID 83843

Prosecutor: Lori Gilmore  
Lamont Anderson

Mailed X Hand Delivered X

Dated: Monday, January 23, 2006

Robin Christensen  
Clerk Of The District Court

By:

She K. Summerberry  
Deputy Clerk  
DOC22 7/96

00000296

**JOAN M. FISHER**  
 Idaho State Bar No. 2854  
**OLIVER W. LOEWY**  
 Limited Admission  
 Capital Habeas Unit  
 Federal Defenders of Eastern Washington & Idaho  
 317 West 6<sup>th</sup> Street, Suite 204  
 Moscow, ID 83843  
 Telephone: 208-883-0180  
 Facsimile: 208-883-1472

CLERK OF DISTRICT COURT  
 CLEARWATER COUNTY  
 CROFT, IDAHO

2006 FEB 10 P 4:16

CV 2002-443

CR 81-8495

SK DEPT

Attorneys for Petitioner Gene F. Stuart

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

**GENE FRANCIS STUART,**  
 Petitioner,

Case Nos. CV2002-00443  
 CR 81-0008495

v.

**STATE OF IDAHO,**  
 Respondent.

PETITIONER'S SUPPLEMENTAL  
 BRIEFING IN OPPOSITION TO  
 (1) MOTION FOR SUMMARY  
 DISMISSAL OF PETITION FOR  
 POSTCONVICTION RELIEF AND/OR  
 WRIT OF HABEAS CORPUS AND  
 (2) IDAHO CRIMINAL RULE 35  
 PETITION

Full briefing had already occurred when a stay was granted in this case. Specifically, after Petitioner filed his Petition For Postconviction Relief And/Or Writ Of Habeas Corpus, Respondent filed its Motion For Summary Dismissal, Petitioner filed his Response In Opposition, and Respondent filed its Reply. On January 6, 2006, the Court granted Petitioner leave to file supplemental briefing regarding the State's motion for summary dismissal.

PETITIONER'S SUPPLEMENTAL BRIEFING IN OPPOSITION TO  
 (1) MOTION FOR SUMMARY DISMISSAL OF PETITION FOR  
 POSTCONVICTION RELIEF AND WRIT OF HABEAS CORPUS AND  
 (2) IDAHO CRIMINAL RULE 35 PETITION -1

00000297

**I. PETITIONER IS ENTITLED TO *RING* RELIEF AS A MATTER OF STATE AND FEDERAL RETROACTIVITY LAW.**

Petitioner anticipates that Respondents will argue that his §2719 petition should be dismissed (1) pursuant to allegedly controlling Idaho Supreme Court precedent holding that *Schriro v. Summerlin*, 542 U.S. 348 (2004), is not retroactive as a matter of Idaho retroactivity law, (2) because §2719 prohibits postconviction application claims which depend on the retroactive application of new law, and (3) because, as a matter of federal retroactivity law, *Ring v. Arizona*, 536 U.S. 584 (2002), must be applied uniformly without regard to context and even though the application will in some contexts lead to inaccurate fact findings and, therefore, erroneous death sentences.

**A. Idaho Retroactivity Principles Require That *Ring* Be Retroactively Applied, And The Idaho Supreme Court Has Not Held Otherwise.**

Petitioner anticipates that Respondent will assert that the Idaho Supreme Court has concluded that *Ring* is not retroactive to cases on collateral review and that, for support, it will cite to and discuss as authority for this proposition three recent Supreme Court cases, *Porter v. State*, 140 Idaho 780, 102 P.3d 1099 (2004), *State v. Leavitt*, 141 Idaho 895, 120 P.3d 283 (2005), and *Hoffman v. State*, – P.3d –, 2005 WL 22220025 (2005). However, far from concluding in any of these cases that *Ring* is not retroactive as a matter of state law, the Idaho Supreme Court simply refused to address the question. Specifically, in *Porter*, the Idaho



Supreme Court sidestepped the question squarely presented by announcing for the first time and without explanation or citation to authority that state retroactivity law has no application where the rule whose retroactivity is at issue is based solely on the federal constitution. Noting that “[t]he issue raised...in this application for post-conviction relief is based solely upon the Federal Constitution,” the Supreme Court held that, “[t]herefore, the retroactivity of that decision [i.e.- *Ring*] is a matter of federal law, not state law.” *Porter* at 783, 1102 (italics added). Similarly, in the later decision *Leavitt* where the district court had dismissed the *Ring* postconviction petition solely on the ground that the anti-retroactivity provision required dismissal, the Supreme Court affirmed on the *alternative* ground that “*Ring v. Arizona* does not apply retroactively under federal law.” *Leavitt*, at \_\_\_, 286. Finally, in *Hoffman* the Supreme Court did not address whether *Ring* was retroactive as a matter of state law.

Before *Porter*, the Idaho Supreme Court had never before held that as a matter of state retroactivity law the retroactivity of rights based solely in the federal constitution is a matter exclusively of federal law. Nor is there any such federal law requirement. On the contrary, the Supremacy Clause of the federal constitution prohibits states from applying new federal rules only to a narrower, not a broader, range of cases than allowed by federal retroactivity doctrine. See Petitioner’s Response In Opposition To Motion For Summary Dismissal Of Petition For Postconviction Relief And/Or Writ Of Habeas Corpus (“Petitioner’s Response”) at 26.

This Court may choose not to apply *Ring* to Petitioner’s case, but doing so would fly in the face of Idaho’s clear state retroactivity law. See Petitioner’s Response at 46-50. (Section III: “Under this Court’s Retroactivity Rules, the Rule at Issue Should Be Applied to All Cases”).

Further, if this Court chooses not to apply *Ring* either by not addressing the issue or by citing the rule first announced in *Porter*, doing so will violate Petitioner's state and federal constitutional rights to due process.

**B. §2719(5)(c)'s Anti-Retroactivity Provision Does Not Preclude This Court's Considering Petitioner's *Ring* Claim.**

To the extent that Respondents argue or the Court *sua sponte* considers that §2719(5)(c) anti-retroactivity provision precludes Petitioner's §2719 petition, Petitioner relies on the arguments in his *Petitioner's Response* that (1) §2719(5)(c) violates the Idaho Constitution separation of powers requirement; (2) Idaho law prohibits retroactively applying Idaho Code Section 19-2719(5)(c) to Petitioner; (3) applying Idaho Code Section 19-2719(5)(c) in the instant case would violate the United States Constitution's Supremacy Clause (U.S. Const., art. VI, cl. 2); (4) applying Idaho Code Section 19-2719(5)(c) here would violate Petitioner's due process and equal protection rights as guaranteed by the United States Constitution and Idaho Constitution; (5) applying Idaho Code Section 19-2719(5)(c) to Mr. Stuart's case would violate the United States Constitution's and Idaho Constitution's prohibitions against *ex post facto* laws; and (6) equity requires applying *Ring* to the instant case. See Petitioner's Response at 20-38 (Section I.B.).

02/10/2000 17:13 20000317

**C. The Court Should Reject A Mechanistic Approach to United States Supreme Court Decisions: *Summerlin* Should Be Applied Only to Cases Where the Legal Constraints on the Evidence Considered by the Sentencing Judges Did Not Implicate the Accuracy of the Judge's Fact Findings Necessary to Imposing the Death Sentence.**

Petitioner anticipates that Respondent will argue that in *Summerlin* the United States Supreme Court announced a monolithic holding to be applied uniformly across differences in state sentencing structures. There is no reason to think that the Supreme Court intends any of its holdings to be applied in this way. Indeed, reasoned opinions are especially valuable because they allow the public and litigants particularly to understand the boundaries of the rules under consideration. The reason that the differences between Arizona's and Idaho's now superseded judge sentencing schemes matters is that they implicate the accuracy of the sentencing judge's fact findings. Arizona did not allow its sentencing judges to consider hearsay, Idaho did. The reason this matters, of course, is that if accuracy is sufficiently implicated and if switching to jury sentencing significantly increases accuracy, then *Ring* must be retroactively applied. *Teague v. Lane*, 489 U.S. 288 (1989). Pointing out that courts are divided on whether *Crawford v. Washington*, 541 U.S. 36 (2004), has resulted in greater accuracy of convictions, Respondents conclude that Arizona's approach does not result in increased accuracy. Yet Petitioner does not contend that no hearsay is permissible, only that Idaho having allowed the sentencing judge to consider any and all hearsay requires that *Ring* be applied retroactively.

Respondent's anticipated position repeats this mistake, i.e.-assumes that the particulars under consideration extend to all cases, in its analysis of *Summerlin*. It quotes the United States Supreme Court as concluding that, "When so many presumably reasonable minds continue to

disagree over whether juries are better factfinders *at all*, we cannot confidently say that judicial factfinding *seriously* diminishes accuracy.” Surely, though, the Supreme Court was not blind to the possibility that if only either juries or judges (but not the other) were allowed to consider an entirely additional class of evidence, it might well affect factfinding accuracy and therefore, require the retroactive application of *Ring*. Contrary to Respondent’s view, there is no reason to think that whether a rule should be applied retroactively is a question to be answered without considering the factfinding rule governing the factfinders. Very different sets of rules applied in Arizona and Idaho, and it cannot seriously be disputed that the difference implicated accuracy and, therefore, the retroactive application question. *Brief In Support* at 7.

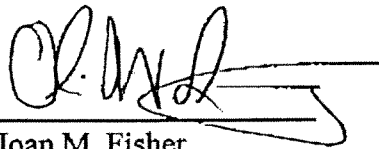
02/10/2006 11:13 20000317

**CONCLUSION**

For the foregoing reasons and for the reasons in all previous filings in the instant matter, Petitioner respectfully asks the Court to grant his pending Petition For Postconviction Relief And/Or Writ Of Habeas Corpus, vacate the judgment and sentence, and order new sentencing proceedings.

Dated this 10<sup>th</sup> day of February, 2006.

Respectfully submitted,



Joan M. Fisher  
Oliver W. Loewy  
Capital Habeas Unit  
Federal Defenders of Eastern Washington & Idaho  
208-883-0180

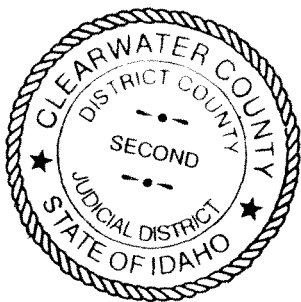
Attorneys for Petitioner

## CERTIFICATE OF SERVICE

I hereby certify that on the 10<sup>th</sup> day of February \_\_\_\_, 2006, I caused to be served a true and correct copy of the foregoing document by the United States Postal Service, first class postage affixed, addressed to:

L. LaMont Anderson  
Deputy Attorney General  
Chief, Capital Litigation Unit  
P.O. Box 83720  
Boise ID 83720-0010

Deborah L. Huss



STATE OF IDAHO      County of Clearwater  
I hereby Certify that the foregoing is a full, true, and correct copy of an instrument as the same now remains on file and of record in my office.

WITNESS my hand and official seal hereon affixed  
this 21<sup>st</sup> day of FEB AD 2006  
ROBIN CHRISTENSEN, CLERK OF THE DISTRICT  
COURT EX OFFICIO AUDITOR & RECORDER

by Deputy Sue K. Swannerton

PETITIONER'S SUPPLEMENTAL BRIEFING IN OPPOSITION TO  
(1) MOTION FOR SUMMARY DISMISSAL OF PETITION FOR  
POSTCONVICTION RELIEF AND WRIT OF HABEAS CORPUS AND  
(2) IDAHO CRIMINAL RULE 35 PETITION -8

00000304

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

STEPHEN A. BYWATER  
Deputy Attorney General  
Chief, Criminal Law Division

L. LAMONT ANDERSON, ISB # 3687  
Deputy Attorney General  
Criminal Law Division, Capital Litigation Unit  
P.O. Box 83720  
Boise, Idaho 83720-0010  
Telephone: (208) 334-4539

CLERK OF DISTRICT COURT  
CLEARWATER COUNTY  
IDAHO

CV 02-10 P 1-13

CV02-495

Srg

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

GENE FRANCIS STUART,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

and

STATE OF IDAHO,

Plaintiff,

vs.

GENE FRANCIS STUART,

Defendant.

CASE NO. CV 2002-C000443

SUPPLEMENTAL BRIEF IN SUPPORT  
OF RESPONDENT'S MOTION  
FOR SUMMARY DISMISSAL

CASE NO. CR81-0008495

SUPPLEMENTAL BRIEF IN SUPPORT  
OF RESPONDENT'S MOTION  
FOR SUMMARY DISMISSAL

COMES NOW, L. LaMont Anderson, Deputy Attorney General, Chief, Capital

Litigation Unit and Special Prosecuting Attorney for Clearwater County, State of Idaho,

SUPPLEMENTAL BRIEF IN SUPPORT OF RESPONDENT'S MOTION FOR SUMMARY  
DISMISSAL - 1

00000305

and does hereby submit, pursuant to this Court's Order, this supplemental brief in support of the state's Motion for Summary Dismissal.

### **BACKGROUND**

The relevant background for the state's Motion for Summary Dismissal has been detailed in the state's opening brief. (State's brief in support, pp. 2-3.) Petitioner ("Stuart") filed a response to the state's brief and supplemental authority that has subsequently been reversed by the Idaho Supreme Court. See Porter v. State, 140 Idaho 780, 102 P.3d 1099 (2004). The state filed a reply brief. Over the state's objection, this Court stayed Stuart's case pending the United States and Idaho Supreme Courts' decisions regarding the retroactivity of Ring v. Arizona, 536 U.S. 584 (2002). Based upon the Supreme Court's decision in Schiro v. Summerlin, 542 U.S. 348 (2004), and the Idaho Supreme Court's decisions in Hoffman v. State, 142 Idaho 27, 121 P.3d 958 (2005), State v. Leavitt, 141 Idaho 895, 120 P.3d 283 (2005), and Porter v. State, 140 Idaho 780, 782, 102 P.3d 1099 (2004), this Court granted the state's motion to lift the stay and ordered supplemental briefing.

### **ARGUMENT**

In Summerlin, 542 U.S. at 358, the United States Supreme Court definitively concluded the dictates of Ring are not retroactive to cases on collateral review when it determined, "Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review." Clearly, because the Idaho Supreme Court has previously upheld Stuart's death sentence on direct appeal long before Ring was announced, Summerlin establishes that Ring has no application to Stuart's instant case.



The Idaho Supreme Court has also concluded Ring is not retroactive to cases on collateral review. In Porter, 140 Idaho at 782, relying upon Summerlin, the Idaho Supreme Court reversed the district court's conclusion that Ring was retroactive. In Leavitt, 120 P.3d at 285-86, and Hoffman, 121 P.3d at 960, the Idaho Supreme Court dismissed appeals based upon the retroactivity of Ring, because the claim did not fall within the exception of I.C. § 19-2719.

Stuart contends Summerlin is inapplicable in Idaho because it was allegedly based upon Arizona's capital statutory sentencing scheme. However, the Idaho Supreme Court has expressly rejected such arguments. In Porter, 140 Idaho at 782, the court explained, "Summerlin was based solely upon the Supreme Court's determination that Ring announced a new rule of procedure that would not be applied retroactively unless it was a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." The court further recognized, "whether or not hearsay evidence can be considered when determining the existence of an aggravating factor is an issue that is separate and distinct from the issue of whether it is a judge or a jury who makes that determination." Id. at 783. Porter was most recently reaffirmed in Hoffman, 121 P.3d at 960.

Summerlin itself confirms the Idaho Supreme Court's analysis is correct. Summerlin makes absolutely no reference to Arizona's prior capital sentencing scheme or the alleged "accuracy" associated with that scheme. Rather, Summerlin focuses upon "whether judicial factfinding so 'seriously diminish[es]' accuracy that there is an 'impermissibly large risk' of punishing conduct the law does not reach." Id. 542 U.S. at 355-56 (emphasis in original) (quoting Teague v. Lane, 489 U.S. 288, 312-13 (1989)).

Without reference to any statutory sentencing scheme capital or non-capital, the Court responded, "The evidence is simply too equivocal to support that conclusion." *Id.* at 356. Recognizing there are multiple arguments why juries are less accurate fact-finders than judges, noting the Court had opined judicial sentencing may even be more consistent, and referencing "the mixed reception that the right to jury trial has been given in other countries," the Court concluded, "When so many presumably reasonable minds continue to disagree over whether juries are better factfinders *at all*, we cannot confidently say that judicial factfinding *seriously* diminishes accuracy." *Id.* (emphasis in original).

The state is aware of no jurisdiction that has concluded Summerlin is restricted to a sentencing scheme similar to Arizona's prior capital sentencing scheme. In fact, several federal circuits have relied upon the rationale in Summerlin to conclude the Supreme Court's decision in United States v. Booker, 543 U.S. 220 (2005), is not retroactive to cases on collateral review.<sup>1</sup> See, e.g., Lloyd v. United States, 407 F.3d 608, 614 (3<sup>rd</sup> Cir. 2005) ("Every federal court of appeals to have considered whether *Booker*'s new rule constituted a 'watershed rule' that would satisfy *Teague*'s second exception has held that it does not and, thus has held that *Booker* does not apply retroactively to cases on collateral review") (citing cases). In Lloyd, the Third Circuit rejected the government's contention that Teague's "watershed rules" exception applies only to rules that improve the accuracy of the guilt or innocence of a defendant, and expressly relied

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<sup>1</sup> In Blakely v. Washington, 542 U.S. 296, 305 (2004), the Supreme Court held that Washington State's determinate sentencing scheme violated the Sixth Amendment right to a jury trial because judges were imposing sentences that were not based solely on facts reflected in the verdict of the jury or admitted by the defendant, and used a preponderance of the evidence standard to find the facts necessary to impose the sentence. In Booker, 543 U.S. at 244, the Supreme Court extended Blakely to the Federal Sentencing Guidelines.

upon the Supreme Court's recognition that "the Court could not say that the rule announced in *Ring* so significantly improved accuracy that it should apply retroactively to cases already final on direct review." 407 F.3d at 114 (citing Summerlin, 542 U.S. at 348). Even though the Federal Sentencing Guidelines and federal sentencing procedures are not similar to Arizona's prior capital sentencing scheme, the courts have recognized the rationale in Summerlin mandates Booker should not be applied retroactively to cases on collateral review.

Likewise, other states with statutory sentencing schemes significantly different than Arizona's prior capital sentencing scheme have relied upon the rationale from Summerlin in determining retroactivity issues, particularly with respect to Blakely, Ring and Apprendi v. New Jersey, 630 U.S. 466 (2000), the Supreme Court's precursor to Ring. See, e.g., Johnson v. Florida, 904 So. 2d 401, 407-09 (Fla. 2005); People v. Amis, 22 Cal. Rptr. 3d 908, 913-17 (Cal. App. 2005); Lucien v. Briley, 821 N.E.2d 1143-1153 (Ill. 2005). Stuart has failed to point to any jurisdiction or case that has distinguished Summerlin based upon Arizona's statutory sentencing scheme.

The underlying theme of Stuart's argument is that confrontation and cross-examination necessarily increase the accuracy of the fact-finder. However, in addressing whether the Supreme Court's decision in Crawford v. Washington, 541 U.S. 36 (2004), which dramatically changed how the courts are to interpret the Confrontation Clause, should be retroactively applied, the courts are divided on the significance of confrontation and cross-examination. Recently the Seventh Circuit concluded Crawford does fall within Teague's second exception. Addressing the accuracy of convictions based upon Crawford, the court explained, "it is unclear that *Crawford*'s modification to

the hearsay rules will markedly improve the accuracy of convictions. *Crawford* is not a guarantee of accuracy, but an extension of the full constitutional protections of the Sixth Amendment. While the two concepts overlap, they are not synonymous.” *Bintz v. Berzand*, 403 F.3d 859, 867 (7<sup>th</sup> Cir. 2005) (internal quote and citation omitted). As further explained in *Murillo v. Frank*, 402 F.3d 786, 790 (7<sup>th</sup> Cir. 2005), it is a “close question whether *Crawford* helps or hinders accurate decisionmaking.” The court explained:

Live testimony is preferable to affidavits and transcribed confessions, because cross-examination can probe its weaknesses, but recorded testimony may be better than silence, when death or incapacity or threats or loyalty to one’s confederates keep witnesses off the stand. The point of *Crawford* is not that only live testimony is reliable, but that the sixth amendment gives the accused a right to insist on live testimony, whether that demand promotes or frustrates accuracy. Like the self-incrimination clause and other provisions in the Bill of Rights, the confrontation clause can be invoked to prevent the conviction of persons who are guilty in fact. What *Crawford* holds is that defendants enjoy this right even when the hearsay is trustworthy.

*Id.* (emphasis in original).

In *Mungo v. Duncan*, 393 F.3d 327, 335 (2<sup>nd</sup> Cir. 2004), the Second Circuit concluded *Crawford* would not necessarily improve the overall accuracy of the criminal process because “*Crawford* also precludes admission of highly reliable testimonial out-of-court statements that would have been admissible under the old rules.”

In fact, the Supreme Court has expressly approved the use of hearsay from a presentence report in a capital case before a jury. *Engle v. Georgia*, 428 U.S. 153, 203-204 (1976). Based upon the need for individualized sentencing in capital cases, see *Payne v. Lynaugh*, 492 U.S. 302, 319 (1989), any reliance Stuart makes based upon confrontation and cross-examination to distinguish *Summerlin*, is seriously overstated.

See also United States v. Chan, 426 F.3d 1318, 1322-23 (11<sup>th</sup> Cir. 2005) (noting that even if federal circuit to consider the issue post-Grady, has reasoned that admission of hearsay testimony at sentencing does not violate confrontation rights).

Finally, any claim that the Idaho Supreme Court should deviate from Summerlin, based upon state law grounds, has already been expressly rejected in Hoffman, 121 P.3d at 960. As recognized by the court, "We have expressed on many occasions in the past our confidence in the ability of the district judges to carefully and fairly weigh the facts relating to the imposition of the death penalty. . . . We do not believe the prior process was unfair or suspect." Id.

Stuart attempted to avoid the pitfalls of I.C. § 19-2719(5) by also raising his successive claims under the guise of a Rule 35 motion. I.C.R. 35, in relevant part, states, "The court may correct an illegal sentence at any time and may correct a sentence that has been imposed in an illegal manner within the time provided herein for the reduction of sentence."

However, I.C. § 19-2719(4) expressly states:

**Any remedy available by post-conviction procedure, habeas corpus or any other provision of state law must be pursued according to the procedures set forth in this section and within the time limitations of subsection (3) of this section.**

(Emphasis added.)

In State v. Beam, 121 Idaho 862, 864, 823 P.2d 891 (1992), the defendant claimed his sentence was illegally imposed because the district court failed to weigh each aggravating circumstance against all mitigating circumstances in accord with State v. Charboneau, 116 Idaho 129, 774 P.2d 299 (1989). Without addressing whether Beam's

claim even constituted an illegal sentence, the supreme court examined the apparent conflict between I.C.R. 35 and I.C. § 19-2719, and concluded:

Because of the unique nature of the death penalty, as provided in chapter 27, title 19, I.C., as well as the stringent constitutional protections afforded to a person sentenced to death, we hold that I.C. § 19-2719(3), which, in turn, creates, defines, and regulates a primary right, is a substantive rule.

Therefore, we conclude that the forty-two (42) day time limitation of I.C. § 19-2719(3) applies to claims of illegality of a sentence of death.

Id. 11 Idaho at 864.

The rationale in Beam has been reaffirmed in McKinney, 133 Idaho at 705, and applied to claims involving Ring. Leavitt, 120 P.3d at 285. "Because Rule 35 does not apply to [Stuart's] challenge to his death sentence,' his appeal must be dismissed from the denial of his motion to correct an illegal sentence." Id.

Because this court is obligated to follow the law as defined by the United States and Idaho Supreme Courts, which have determined Ring is not retroactive to cases on collateral review, Stuart's Petition for Post-Conviction Relief and/or Writ of Habeas Corpus and Motion to Correct Illegal Sentence, to Vacate Sentence of Death and for New Sentencing Trial must be dismissed.

CONCLUSION

The state respectfully requests this court grant the state's Motion for Summary Dismissal and dismiss Stuart's successive Petition for Post-Conviction Relief and/or Writ of Habeas Corpus and Motion to Correct Illegal Sentence, to Vacate Sentence of Death and/or New Sentencing Trial.

DATED this 10<sup>th</sup> day of March, 2006.



L. LaMONT ANDERSON  
Deputy Attorney General  
Chief, Capital Litigation Unit

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY That on or about the 10<sup>th</sup> day of March, 2006, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

Joan M. Fisher  
Federal Defenders of  
Eastern Washington & Idaho  
317 W. 6<sup>th</sup> Street, Suite 204  
Moscow, ID 83843  
Fax: (208) 883-1472


\_\_\_ \_\_\_ U.S. Mail  
\_\_\_ \_\_\_ Hand Delivery  
\_\_\_ \_\_\_ Overnight Mail  
\_\_\_ X \_\_\_ Facsimile

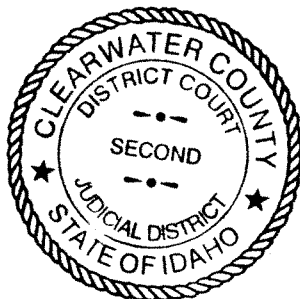
Honorable Ron Schilling  
P.O. Box 1251  
Meridian, ID 83680-1251

\_\_\_ X \_\_\_ U.S. Mail  
\_\_\_ \_\_\_ Hand Delivery  
\_\_\_ \_\_\_ Overnight Mail  
\_\_\_ \_\_\_ Facsimile

Lori Gilmore  
Clearwater County Prosecutor  
Box 2627  
Orofino, ID 83544  
Fax: (208) 476-9710

\_\_\_ \_\_\_ U.S. Mail  
\_\_\_ \_\_\_ Hand Delivery  
\_\_\_ \_\_\_ Overnight Mail  
\_\_\_ X \_\_\_ Facsimile

  
L. LaMont Anderson



STATE OF IDAHO County of Clearwater  
I, the undersigned, do hereby certify that the foregoing is a true and correct copy of the instrument as the same now appears on file and of record in my office.  
Witness my hand and official seal hereto affixed  
on the 10<sup>th</sup> day of March A.D., 2006  
L. CHRISTENSEN, CLERK OF THE DISTRICT COURT EX OFFICIO AUDITOR & RECORDER

by Deputy Sharon R. Garrison



SCANNED

03/29/07

CLERK OF DISTRICT COURT  
CLEARWATER COUNTY  
IDAHO

2007 MAR 12 A 9:57

CASE NO. CV02-443  
CV02-473

BY Sej

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE  
OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

GENE FRANCIS STUART,	)	
	)	
Petitioner,	)	CASE NO. CV02-00443 and
	)	CV02-00473
	)	
v.	)	MEMORANDUM OPINION ON
	)	PETITION FOR POST
STATE OF IDAHO, and TOM	)	CONVICTION RELIEF AND/OR
BEAUCLAIR, Director, Idaho Department	)	WRIT OF HABEAS CORPUS AND
of Correction, and GREG FISHER, Warden,	)	MOTION TO CORRECT ILLEGAL
Idaho Maximum Security Institution,	)	SENTENCE, TO VACATE SENTENCE
	)	OF DEATH AND FOR NEW
Respondents.	)	SENTENCING TRIAL
	)	

This matter is before the Court on Petitions for Post Conviction Relief and/or Writ of Habeas Corpus filed by Petitioner Gene Francis Stuart in Clearwater County Cases CV02-00443 and CV02-00473. The Court heard oral arguments on the Petitions May 22, 2006. The Court extended an opportunity to the Parties to file supplemental authority by June 8, 2006. Petitioner Stuart was represented by attorney Joan M. Fisher and Oliver W. Loewy with the Federal Defenders Capital Habeas Unit. The State was represented by Deputy Attorney General L. Lamont Anderson. The Court, having considered the Petitions, briefs, affidavits and records in

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the cases, having heard oral arguments of counsel, and being fully advised in the matter, hereby renders its decision.

### **PROCEDURAL BACKGROUND**

Petitioner Stuart (hereinafter "Stuart") was found guilty by a jury of murder by torture in the first degree and was sentenced to death in December 1982 by District Judge Andrew Schwam. Stuart appealed his conviction asserting the following grounds: (1) there was insufficient evidence to warrant a jury instruction and verdict based on first degree murder by torture; (2) an instruction on second degree murder by torture should have been given; (3) the trial court erred in denying Stuart's Motion in *Limine* wherein he sought to exclude evidence of Stuart's physical mistreatment of former wives and girlfriends; (4) the trial court erred in moving the venue of the trial to a site still within the circulation area of the source of prejudicial pretrial publicity; (5) he was denied speedy trial; (6) the sentence imposed was unconstitutional because of the vagueness of the aggravating circumstances relied upon or the failure to use a jury in the sentencing process; and (7) the sentence imposed was disproportionate to the crime committed. On appeal, the Supreme Court affirmed Stuart's conviction and death sentence. *State v. Stuart*, 110 Idaho 163, 715 P.2d 833 (1986) (*Stuart I*).

Following the denial of his direct appeal, Stuart filed his first petition for post-conviction relief. The district court denied and dismissed the petition on the grounds the majority of issues had been decided on direct appeal and no petition for rehearing had been filed, making the issues *res judicata*. The district court found the three remaining issues failed to raise any legal issue or questions of fact that would entitle Stuart to a hearing or relief. Stuart

appealed and, on appeal, the Supreme Court affirmed the district court.<sup>1</sup> *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990) (*Stuart II*).

Stuart filed a second Petition for Post-conviction Relief but that Petition was dismissed by the district court. Stuart appealed, asserting the district court erred when it dismissed his second petition as untimely. On appeal, the Supreme Court found Stuart's second Petition was timely and that Stuart's allegation that his confidential conversations with his attorney had been monitored and recorded was based on newly discovered information not available to Stuart during his direct appeal or first petition for post-conviction relief. The Court reversed the district court's dismissal of the second petition and remanded the matter with instructions that an evidentiary hearing be held. *Stuart v. State*, 118 Idaho 932, 801 P.2d 1283 (1990) (*Stuart III*).

In compliance with the Supreme Court's remand, the district court held an evidentiary hearing to address Stuart's claim that the Clearwater County jail monitored and taped his telephone calls and privileged attorney conversations. However, the district court bifurcated the hearing, directing the parties to first present evidence on the question of whether the taping and monitoring of the phone calls and attorney conversations had occurred. When the district court determined Stuart had failed to meet his burden of proof on the initial question, the court found it unnecessary to address the question of whether Stuart's constitutional rights had been violated. Stuart appealed the district court's ruling. Once again, the Supreme Court reversed and remanded the matter back to the district court after finding the court's conclusions clearly erroneous. *Stuart v. State*, 127 Idaho 806, 907 P.2d 783 (1995) (*Stuart IV*).

The district court held a second evidentiary hearing on Stuart's claim that the Clearwater County Sheriff's Office had recorded confidential conversations between Stuart and his attorney

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<sup>1</sup> Stuart petitioned the Court for rehearing. The Court denied the petition for rehearing. However, the Court withdrew its original opinion and issued a substitute, but still affirming, opinion.

while Stuart was in jail. At the end of the second hearing, the trial court found Stuart's jailhouse conversations had been monitored but that his constitutional rights had not been violated.

Applying the three exceptions to the exclusionary rule, the trial court held that under the independent origin, inevitable discovery, and attenuated bases exceptions, the monitoring of the conversations did not lead to the discovery of evidence or witnesses. Stuart appealed. However, the Supreme affirmed the trial court, finding the law of the case doctrine did not prevent the adoption and application of the exceptions to the exclusionary rule in Stuart's case. *Stuart v. State*, 136 Idaho 490, 36 P.3d 1278 (2001) (*Stuart VI*).

While the appeal in *Stuart IV* was pending, Stuart filed an I.R.C.P. 60(b)(5) motion with the trial court, asserting the Supreme Court's opinion in *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993) had retroactive application and, therefore, entitled Stuart to relief. The trial court denied Stuart's motion and he appealed. The Supreme Court held the ruling in *Tribe* had no retroactive application affirming the district court's dismissal of Stuart's petition. *Stuart v. State*, 128 Idaho 436, 914 P.2d 933 (1996) (*Stuart V*).

Stuart filed his fourth post-conviction petition in August 2002 after the United States Supreme Court entered its decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) and his fifth post-conviction petition in December 2002. It is Stuart's fourth and fifth post-conviction petitions that are the subject of the opinion herein.

### **POST-CONVICTION STANDARD**

In order to be eligible for post-conviction relief, a person who has been convicted of, or sentenced for, a crime must claim:

- (1) That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state;

- (2) That the court was without jurisdiction to impose sentence;
- (3) That the sentence exceeds the maximum authorized by law;
- (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
- (5) That his sentence has expired, his probation, or conditional release was unlawfully revoked by the court in which he was convicted, or that he is otherwise unlawfully held in custody or other restraint;
- (6) Subject to the provisions of section 19-4902(b) through (f), Idaho Code, that the petitioner is innocent of the offense; or
- (7) That the conviction or sentence is otherwise subject to collateral attack upon any ground or alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy.

I.C. § 19-4901 (Supp. 2002).

An application for post-conviction relief must present “admissible evidence supporting its allegations, or the application will be subject to dismissal.” *Fenstermaker v. State*, 128 Idaho 285, 287, 912 P.2d 653 (Ct. App. 1995). In a post-conviction proceeding involving a capital crime, the parties have the same burden of proof as a civil litigant. *State v. Pratt*, 125 Idaho 546, 567, 873 P.2d 800, 821 (1993) (preponderance of the evidence standard applies); *see also Nix v. Williams*, 467 U.S. 431, 444, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377, 387 (1984) (state is required to establish exclusionary rule exceptions by a preponderance of the evidence). Post-conviction petitions in a capital crime case are subject to the provision of I.C. § 19-2719.

### DISCUSSION

On August 2, 2002, Petitioner Stuart filed a Petition for Post-conviction Relief and/or Writ of Habeas Corpus and Motion to Correct Illegal Sentence, to Vacate Sentence of death and for New Sentencing Trial in Clearwater County Case No. CV02-00443.<sup>2</sup> This petition seeks relief based on the opinion entered by the United States Supreme Court in *Ring v. Arizona*, 536

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<sup>2</sup> Clearwater County Case No. CV02-00443 was previously designated Clearwater County Case No. SP02-00109.

U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). On August 30, 2002, the State filed a Motion for Summary Dismissal.

On December 3, 2002, Petitioner Stuart filed a Petition for Post-conviction Relief and Petition for Writ of Habeas Corpus in Clearwater County Case No. CV02-00473.<sup>3</sup> Petitioner's allegation in this Petition can be divided into three categories: (1) misconduct on the part of the prosecutor; (2) the withholding of mitigating information; and, (3) ineffective assistance of counsel. The State moved for summary disposition on October 10, 2003.

In March 2004 the Court stayed the proceedings in Clearwater County Cases No. CV02-473 and CV02-00443 pending rulings by the United States Supreme Court in *Schriro v. Summerlin*, 542 U.S. 348 and the Idaho Supreme Court in *State v. Hoffman*, 142 Idaho 27, as the cases had the potential of being dispositive on the question of whether the *Ring* holding had retroactive application. The Court lifted the stays on January 6, 2006, after opinions were entered in *Schriro v. Summerlin* and *State v. Hoffman*.

**(A) PETITION IN CASE NO. CV02-00443**

Stuart's petition to vacate his death sentence, correct illegal sentence and for new sentencing was brought following the decision of the United States Supreme Court in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The Court in *Ring* held that the Sixth Amendment precludes a sentencing judge, sitting without a jury, to find the aggravating circumstances necessary for imposition of the death penalty. The Court reasoned that, because statutorily enumerated aggravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires the factors be found by a jury. *Ring v. Arizona*, 536 U.S. at 606. However, the question of whether *Ring* had retroactive application was not

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<sup>3</sup> Clearwater County Case No. CV02-00473 was previously designated Clearwater County Case No. SP02-00151.

decided until two years later when the Court heard the case of *Schriro v. Summerlin*.

In *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), the question of the applicability of the *Ring* decision was placed squarely before the Court. In deciding the question, the Court noted that when it enters a decision that results in a new rule that is substantive in nature, the new rule generally has retroactive application. *Schriro v. Summerlin*, 542 U.S. at 351. However, when the new rule is procedural in nature, it generally does not apply retroactively. *Schriro v. Summerlin*, 542 U.S. 351. The Court then held that the new rule announced in *Ring* is “a new procedural rule that does not apply retroactively to cases already final on direct review.” *Schriro v. Summerlin*, 542 U.S. at 358. A year later, relying on the Court’s decision in *Schriro v. Summerlin*, the Idaho Supreme Court held in *State v. Hoffman*, 142 Idaho 27, 121 P.3d 958 (2005), that the ruling in *Ring* had no retroactive application.

In the instant case, Stuart’s direct appeal was final well in advance of the *Ring* decision. Therefore, based on the holding in *Schriro v. Summerlin* and the holding of the Idaho Supreme Court in *State v. Hoffman*, the ruling in *Ring* has no application to Stuart’s sentence.

Nevertheless, in one of his claims at page 10 of his Petition, Stuart states:

By the twenty year judicial delay in the correct determination of the unconstitutionality of the death sentence imposed on Petitioner, Petitioner has been unconstitutionally subjected to cruel and unusual punishment in violation of the Eighth and Fourteenth amendments to the United States Constitution and Idaho Constitution, Article 1, Sections 1, 6, 13 and 18.

This claim fails because the death sentence imposed on Petitioner was not unconstitutional.

To the extent that Stuart argues that the delay itself in carrying out the sentence constitutes constitutional violations, this argument is unreasonable and not supported by authority. The delay in carrying out the sentence was necessitated in order for the Courts to examine the numerous issues raised by Stuart (as was his right). Stuart is now asking the courts

to revisit many of these issues and examine other issues that were not timely raised contrary to I.C. 19-2719.

**(B) PETITION IN CASE NO. CV02-00473**

Stuart's petition in this case raises a number of issues that are best addressed by dividing the claims into three categories: (1) misconduct on the part of the prosecutor; (2) the withholding of mitigating information; and, (3) ineffective assistance of counsel. The State contends Stuart's current post-conviction relief petition must be dismissed as it is untimely under I.C. § 19-2719. The State further contends Stuart's current post-conviction petitions fail to meet the statutory exception to the time limits set out in the statute. Stuart argues I.C. § 19-2719 is inapplicable to his case because his sentence is invalid pursuant to *Ring v. Arizona* and/or that application of I.C. § 19-2719 violates state and federal constitutional provisions and violates other Idaho law.

**(1) APPLICABILITY OF I.C. § 19-2719 TO STUART'S CASE**

As discussed above, *Ring v. Arizona* has no retroactive application to Stuart's death sentence judgment as his direct appeal was final well before *Ring* was decided. Therefore, Stuart's death sentence is a valid and lawful sentence within the contemplation of I.C. § 19-2719. The Court must, however, address Stuart's alternative argument that application of I.C. § 19-2719 to his case violates federal and state constitutional law as well as other Idaho law.

In 1984, the Idaho legislature enacted I.C. § 19-2719. The purpose of the statute, as articulated by the legislature in the language of the statute, is to eliminate unnecessary delay in carrying out death sentences. The standard for review applicable to the statute has been well established by Idaho's Supreme Court.

In capital cases, I.C. § 19-2719 modifies and supersedes the UCPA. *McKinney*, 133 Idaho at 700, 992 P.2d at 149. The purpose of I.C. § 19-2719 is to eliminate "unnecessary delay in carrying out a valid death sentence." *Rhoades v. State*, 135 Idaho 299, 301, 17 P.3d 243, 245 (2000) (quoting *McKinney v. State*, 133 Idaho at



705, 992 P.2d at 154). The procedures and time limits of I.C. § 19-2719 must be followed in capital cases. *McKinney*, 133 Idaho at 700, 992 P.2d at 149.

Generally, in a capital case, a claimant for post-conviction relief will have only one opportunity to raise all challenges to the conviction and sentence. *Id.* All known challenges must be raised in one post-conviction application within 42 days of the filing of the judgment imposing the death penalty. *Row v. State*, 135 Idaho 573, 576, 21 P.3d 895, 898 (2001). Any known challenges or claims not raised within 42 days are deemed waived. *Id.* Our Court strictly construes the waiver provision of I.C. § 19-2719. *Id.* at 701, 992 P.2d at 150.

*Dunlap v. State*, 141 Idaho 50, 57, 106 P.3d 376 (2004).

(a) Stuart's Ex Post Facto Argument

In the instant case, Stuart's capital sentence judgment was entered prior to enactment of I.C. § 19-2719. Stuart contends that application of the subsequently enacted statute to his case violates the *ex post facto* clauses of the federal and state constitutions.

When the statute was enacted in 1984, the legislature included the following language in the session law:

This act shall apply to all cases in which capital sentences were imposed on or prior to the effective date of this act but which have not been carried out, and to all capital cases arising after the effective date of this act.

Idaho Session Laws 1984, ch. 159, § 8, p. 390.

Recognizing the legislative directive given with the enactment of the statute, Idaho's Supreme Court has stated:

The operation of I.C. § 19-2719 is not limited by the existence of previous proceedings using different procedural rules. The provisions of I.C. § 19-2719 apply "to all cases in which capital sentences were imposed on or prior to the effective date [April 2, 1984]." I.C. § 19-2719a. I.C. § 19-2719(4) requires that any habeas corpus or post-conviction remedies in capital cases must be pursued under the procedures set out in I.C. § 19-2719 and the 42-day time period of I.C. § 19-2719(3).

*McKinney v. State*, 133 Idaho 695, 703, 992 P.2d 144 (1999).

Stuart, however, contends application of the subsequently enacted statute to his case violates the *ex post facto* clause of the state and federal constitutions. The United States Supreme Court has consistently held that retroactive application of a procedural statute does not violate the *ex post facto* clause of the constitution where the change does not alter the definition of crimes or increase the punishment for criminal acts. See *Garner v. Jones*, 529 U.S. 244, 120 S.Ct. 1362, 146 L.Ed.2d 236 (2000); *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990). Idaho's Supreme Court has echoed the higher Court's analysis regarding retroactive application of procedural statutes.

The *ex post facto* doctrine prohibits a state from "retroactively alter[ing] the definitions of crimes or increas[ing] the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43, 110 S.Ct. 2715, 2719, 111 L.Ed.2d 30, 39 (1990). Provisions of the federal and state constitutions prohibit changes in the law and changes in procedure that affect matters of substance. *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). A change in law will be deemed to affect matters of substance where it increases the punishment or changes the ingredients of the offense or the ultimate facts necessary to establish guilt. *Hopt v. Utah*, 110 U.S. 574, 580, 4 S.Ct. 202, 205, 28 L.Ed. 262, 265 (1884). Decisions of "substantive criminal law" are those that reach beyond issues of procedural function and address the meaning, scope, and application of substantive criminal statutes. *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir.2003), *cert. granted* 72 U.S.L.W. 3362-63 (Dec. 2, 2003), *citing Bousley v. United States*, 523 U.S. 614, 620, 118 S.Ct. 1604, 1609, 140 L.Ed.2d 828, 838 (1998).

*State v. Lovelace*, 140 Idaho 73, 77, 90 P.3d 298 (2004).

Idaho Code § 19-2719 establishes the time frame in which petitions for post-conviction relief may be brought in a capital case. In addition, the statute establishes the sole standard by which a post-conviction relief petition may be brought outside of the established time frame. By definition, I.C. § 19-2719 is a procedural statute rather than a substantive statute. The difference between procedure and substance was addressed by the Court in *State v. Beam*.

The distinction between procedure and substance was well stated in *Currington*, 108 Idaho at 541, 700 P.2d at 944:

Although a clear line of demarcation cannot always be delineated between what is substantive and what is procedural, the following general guidelines provide a useful framework for analysis. Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus *creates, defines, and regulates primary rights*. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.

Quoting *State v. Smith*, 84 Wash.2d 498, 501, 527 P.2d 674, 676-77 (1974) (emphasis added).

*State v. Beam*, 121 Idaho 862, 863, 828 P.2d 891 (1992).

(b) Stuart's Due Process and/or Equal Rights Arguments

Stuart also contends that application of I.C. § 19-2719 to his case violates his due process and/or equal rights as it provides less protection to capital case petitioners for post-conviction relief than are provided to non-capital case petitioners. Idaho's appellate courts have repeatedly and consistently rejected such arguments. This Court specifically rejected this argument in *State v. Beam*, 115 Idaho 208, 766P.2d 678 (1988), cert. denied, 489 U.S. 1073, 109 S.Ct. 1360, 103 L.Ed.2d 827 (1989). Noting first that the rational basis test was the applicable standard through which the statute's constitutionality would be determined, the Court held:

We hold that the legislature's determination that it was necessary to reduce the interminable delay in capital cases is a rational basis for the imposition of the 42-day time limit set for I.C. § 19-2719. The legislature has identified the problem and attempted to remedy it with a statutory scheme that is rationally related to the legitimate legislative purpose of expediting constitutionally imposed sentences. Accordingly, I.C. § 19-2719 does not violate the defendant's constitutional right to equal protection, and the trial court correctly denied [the defendant's] post conviction petition.

*Id.* at 213, 766 P.2d at 683; see also *State v. Hoffman*, 123 Idaho 638, 647, 851 P.2d 934, 943 (1993) (applying *Beam* to reject constitutional challenge to I.C. § 19-2719), cert. denied, 511 U.S. 1012, 114 S.Ct. 1387, 128 L.Ed.2d 61 (1994); *State v. Rhoades*, 120 Idaho 795, 806-07, 820 P.2d 665, 676-74 (1991) (upholding constitutionality of I.C. § 19-2719 under due process clause of U.S. Constitution), cert. denied, 504 U.S. 987, 112 S.Ct. 2970, 119 L.Ed.2d 590 (1992).

*Lankford v. State*, 127 Idaho 100, 102, 897 P.2d 991 (1995).

(c) Stuart's Vagueness Argument

Stuart contends I.C. § 19-2719 is void for vagueness, arguing the term “known” and/or phrase “reasonably should have been known”, as used in subpart (5) of the statute, are subject to varying interpretations and impose a less stringent standard than would have been imposed had the legislature used the phrase “reasonably *could* have known”. Stuart’s argument, which cites to little or no law in support, is not persuasive.

Vagueness may invalidate a criminal law either because the statute fails to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits or because it may authorize and even encourage arbitrary and discriminatory enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 42, 119 S.Ct. 1849, 1859, 144 L.Ed.2d 67 (1999), citing *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1859, 75 L.Ed.2d 903, 908, 909 (1983). The test for vagueness to be applied in Idaho, if the law does not regulate constitutionally protected conduct or a significant amount of that conduct, is to ask whether the statute gives notice to those who are subject to it and whether the statute provides sufficient guidelines for the exercise of discretion by those who must enforce the ordinance. See *State v. Bitt*, 118 Idaho at 588, 798 P.2d at 47. It has long been held that a statute should not be held void for uncertainty if any practical interpretation can be given the statute. *City of Lewiston v. Mathewson*, 78 Idaho 347, 350, 303 P.2d 680 (1956).

*State v. Larsen*, 135 Idaho 754, 756, 24 P.3d 702 (2001).

A statute is not constitutionally vague merely because the legislature does not statutorily define the words. *State v. Richards*, 127 Idaho 31, 38, 896 P.2d 357 (Ct.App.1995). “Where the legislature has not provided a definition, terms in a statute are given their commonly understood, everyday meanings.” *State v. Richards*, 127 Idaho at 38. The words “known” and “reasonably should have known” are not vague words but are words commonly used and understood in the English language. Paraphrasing for brevity, Webster’s Dictionary<sup>4</sup> defines “known” as to perceive or understand and to be acquainted or familiar with a thing, place, person, etc. “Reasonable” or “reasonably” is defined as in accord with reason or logic. The distinction

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<sup>4</sup> Webster’s College Dictionary Second Random House Edition 1999.

between the use of the word “could” rather than “should”, as argued by Stuart, is difficult to address as the words have such commonly understood meanings that Webster’s Dictionary provides a history for the words but little or nothing in the way of definitions.

A constitutional challenge of a statute places upon the asserting party a high burden. “The party challenging a statute on constitutional grounds bears the burden of establishing that the statute is unconstitutional and ‘must overcome a strong presumption of validity’.” *State v. Bennett*, 142 Idaho 166, 169, 125 P.3d 522 (2005); quoting *Olsen v. J.A. Freeman Co.*, 177 Idaho 706, 709, 791 P.2d 1285, 1288 (1990). In the instant case, Stuart provides the Court with no case law sufficient to meet his burden of overcoming the presumption of validity.

Stuart’s various constitutional challenges of I.C. § 19-2719 have been previously resolved by the Idaho Supreme Court. As the Supreme Court in *Porter v. State*, 139 Idaho 420, 422, 80 P.3d 1021 (2003) stated in footnote, “Porter also challenges the constitutionality of I.C. § 19-2719 for the first time on appeal. This challenge is baseless, as we have repeatedly upheld the constitutionality of I.C. § 19-2719. See, e.g., *Creech v. State*, 137 Idaho 573, 576-77, 51 P.3d 387.390-91 (2002).” Just as Porter’s and Creech’s constitutional challenges of I.C. § 19-2719 were baseless, so are the challenges posed by Stuart.

(d) Stuart’s Separation of Powers Argument

Stuart asserts I.C. § 19-2719 removes a district court’s jurisdiction to reach the merits of post-conviction petitions filed outside the statute’s time requirements in violation of Idaho’s constitutional separation of powers doctrine. Stuart’s argument lacks merit.

In *Kirkland v. Blaine County Medical Center*, 134 Idaho 464, 4 P.3d 1115 (2000), the Court addressed the issue of legislative powers that affect the judiciary and the separation of

powers doctrine found in the Idaho Constitution. While the *Kirkland* Court was not addressing I.C. § 19-2719, the Court's analysis is nevertheless applicable.

The separation of powers doctrine is embodied in two provisions of the Idaho Constitution. Article II, § 1 provides:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

IDAHO CONST. art. II, § 1.

Article V, § 13 of the Idaho Constitution provides:

The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government; but the legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with the Constitution, provided, however, that the legislature can provide mandatory minimum sentences for any crimes, and any sentence imposed shall not be less than the mandatory minimum sentence so provided. Any mandatory minimum sentence so imposed shall not be reduced.

IDAHO CONST. art. V, § 13.

*Kirkland v. Blaine County Medical Center*, 134 Idaho at 470.

The Court went on to state, "Because it is properly within the power of the legislature to establish statutes of limitations, statutes of repose, create new causes of action, and otherwise modify the common law without violating separation of powers principles, it necessarily follows that the legislature also has the power to limit remedies available to plaintiffs without violating the separation of powers doctrine." *Id.* at 471.

The legislature's enactment of I.C. § 19-2719 did not remove a district court's jurisdiction to reach the merits of a post-conviction petition, as argued by Stuart. Rather, the statute merely sets a time limit for the filing of a post-conviction petition in a capital case and

provides for the filing of a petition outside the time limit if a petitioner can show certain circumstances exist to merit a late filing. If the petition is not timely filed or the exception is not met, only then is the court prevented from determining the petition on the merits. The limits that exist in I.C. § 19-2719 are analogous to statutes of limitations, time limits for appeals, as well as other time limits established by statute or court rule. Therefore, I.C. § 19-2719 does not violate the separation of powers doctrine found in the Idaho Constitution.

## (2) RETROACTIVE APPLICATION OF I.C. § 19-2719 AND IDAHO LAW

Stuart is correct when he asserts that, absent an express legislative statement to the contrary, a statute will not be applied retroactively. When enacting I.C. § 19-2719, the legislature made such an express statement. As already stated by this Court in analyzing Stuart's *ex post facto* argument, when I.C. § 19-2719 was enacted in 1984, the legislature included the following language in the session law:

This act shall apply to all cases in which capital sentences were imposed on or prior to the effective date of this act but which have not been carried out, and to all capital cases arising after the effective date of this act.

Idaho Session Laws 1984, ch. 159, § 8, p. 390.

Recognizing the legislative directive given with the enactment of the statute, Idaho's Supreme Court has stated:

The operation of I.C. § 19-2719 is not limited by the existence of previous proceedings using different procedural rules. The provisions of I.C. § 19-2719 apply "to all cases in which capital sentences were imposed on or prior to the effective date [April 2, 1984]." I.C. § 19-2719a. I.C. § 19-2719(4) requires that any habeas corpus or post-conviction remedies in capital cases must be pursued under the procedures set out in I.C. § 19-2719 and the 42-day time period of I.C. § 19-2719(3).

*McKinney v. State*, 133 Idaho 695, 703, 992 P.2d 144 (1999).

Idaho's Supreme Court made clear I.C. § 19-2719 must be applied to all capital case post-conviction petitions whether the death sentence judgment was entered before or after

enactment of the statute. Therefore, the statute is applicable to Stuart's current petition. When I.C. § 19-2719 is applied, the Court must find Stuart's petition untimely unless Stuart is able to sufficiently show some or all of his claims fall within the exception found in I.C. § 19-2719(5) .

### (3) STUART'S CURRENT POST-CONVICTION CLAIMS

The question the Court must address next, given Stuart's untimely filing of his current post-conviction petition, is whether all or some of his claims were known or reasonably should have been known by Stuart within the time period required by I.C. § 19-2719. As noted earlier in the Opinion, Stuart's post-conviction claims are easily divided into three categories: (1) misconduct on the part of the prosecutor; (2) the withholding of mitigating information; and, (3) ineffective assistance of counsel.

#### (a) Prosecutorial Misconduct Claims

Stuart asserts the following misconduct by the prosecutor: (1) prosecutor advised at least one witness not to say Stuart had mental health issues; (2) prosecutor knew witnesses at the preliminary hearing ingested "small white tab pills which purportedly had a calming effect"; (3) prosecutor encouraged 'prior bad act' witnesses to exchange anticipated testimony by housing them in the same small hotel for the preliminary hearing and for trial and putting witnesses in the same room during the preliminary hearing without advising them not to exchange their anticipated testimony and/or failing to take steps to insure they did not exchange anticipated testimony; (4) the prosecutor encouraged witnesses to exaggerate Stuart's misdeeds by providing a heightened sense of danger by placing police officers at the motel where the witnesses were staying, telling at least one witness that the prosecutor received a threatening call regarding Stuart, requiring Stuart to wear leg irons during the preliminary hearing and requesting additional



security measures at trial that included having uniformed and armed police in the courtroom during the trial and requiring security checks of all persons entering the courtroom.

Each of Stuart's claims of prosecutorial misconduct were known or reasonably should have been known by Stuart at the time he filed his direct appeal and/or at the time he filed his first petition for post-conviction relief. As to Stuart's first assertion of misconduct, Stuart was in the best position to know if he had at any time been diagnosed with mental health problems and who, if any, of the State's witnesses were likely to be aware of his diagnosis. Stuart had the opportunity at the preliminary hearing and again at trial to question witnesses about any knowledge they had regarding Stuart's mental health and, more importantly, Stuart had the opportunity to present his own evidence regarding Stuart's mental health. An admonition by the prosecutor to a lay witness to refrain from volunteering such a statement regarding Stuart's mental health would have been proper. Stuart knew or reasonably should have known when he filed his direct appeal and his prior post-conviction petitions what evidence, if any, was presented or not presented regarding his mental health status.

As for Stuart's assertion that the prosecutor allowed witness to openly share "pills", housed witnesses in the same motel and/or had witnesses wait in the same room, thus encouraging them to share their testimony, such information was known or should have reasonably been known to Stuart at the time of his direct appeal and/or at the time of the filing of his earlier post-conviction petitions. Stuart had the opportunity to question witnesses at the preliminary hearing and at trial, and to contact and interview them between the two proceedings, regarding their accommodations. In addition, Stuart and his counsel could have requested the court admonish the prosecutor and the witnesses that no discussions regarding the case occur between the witnesses until after the conclusion of trial. Finally, Stuart offers nothing beyond mere speculation regarding the alleged "calming pills", pills which may have been antacids,

gum, breath mints or any of a myriad of other benign legal ‘pills’.<sup>5</sup> One must remember that these vague assertions are being made more than twenty years after a jury returned a verdict of guilty.

Stuart’s final claim for prosecutorial misconduct involves the courtroom environment during his preliminary hearing and trial. Stuart was present in the courtroom during both proceedings and therefore knew or reasonably should have known when he filed his direct appeal and his earlier post-conviction petitions that he was wearing leg irons during his preliminary hearing as well as how many police officers were present during the hearing and trial.

(b) Withholding of Mitigating Information Claim

Stuart claims the prosecutor withheld certain mitigating information from the court related to Stuart’s childhood. Stuart contends he and his sisters suffered constant physical and sexual abuse at the hands of his father and that such an environment may have predisposed Stuart to mental health problems, noting his own son required psychiatric care and medication during his adolescence. In support of his claim, Stuart directs the Court to affidavits filed in this matter by his sisters, his son, his former wife, a former girlfriend, an aunt, former friends and neighbors, and the principal of Stuart’s high school in Montana.<sup>6</sup> In varying degrees, the affiants describe Stuart’s childhood as replete with serious physical abuse inflicted by Stuart’s father upon Stuart,

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<sup>5</sup> Statement of Theresa Jo Jacobson dated October 28, 2002, Appendix “A” ¶ 8, “Before testifying at the preliminary hearing, a police officer drove me to the courthouse. There, I was directed to a room. When I entered, Sharie, Vicki, Kathie (the deceased’s mother, and other women who Mr. Stuart had allegedly known and abused were already in the room. I recall that there was a policewoman in the room as well. It was in that room that I first met Sharie, Vicki, and Kathie. When I first entered the room, some were smoking cigarettes and taking small tab pills. Someone offered me a pill, saying that it would calm me down. She offered the pills to me in a normal speaking voice. Nothing she said or did suggested to me that she was joking in any way. My impression was that a police officer in the room had supplied the pills. I declined the pills, but the woman who told me about them and other potential witnesses at the table took some of the pills”

<sup>6</sup> In addition to previously filed affidavits, on May 22, 2006, Stuart filed affidavits or sworn statements from Susan Kathleen Stuart, Gene Lee Dally, Malvin Kraft, Daniel Heagy, Jane Bigley, Jim Bigley, Shari Lee Kuhl, Donna Marquette, Delores Mary Nichols, Claudia Petrie, Doug Wayne Seeger, Coby Smith, Thomas Thorn, Sheri Wald, Esther Ziemann, Virginia Lee Presler, Michael Lowe, Debra Johnson and Rose Connelly.

his siblings and his mother. The affidavits also describe a childhood in which Stuart was exposed to his father's incestuous sexual abuse of Stuart's sisters. It is this tumultuous childhood that Stuart contends the prosecutor "hid" from the court because of its potential mitigating affect. It is curious that the prosecutor is alleged to have hidden Stuart's own childhood from him.

Stuart has produced affidavits supporting a conclusion that his childhood was terrible. Nevertheless, to suggest this information was withheld from the trial court during the sentencing phase does not follow. The person with the best knowledge, insight and understanding of Stuart's childhood is Stuart and persons known to Stuart. If Stuart believed his childhood experiences were mitigating factors that should have been considered by the trial court, it was Stuart and his counsel who had the responsibility to present the information to the court. The prosecutor did not hide, nor could he hide, what was best known by Stuart and available to Stuart to present to the court.

(c) Ineffective Assistance of Counsel

The standard that must be met on post-conviction claims for ineffective assistance of counsel is well established.

To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient, and that the defendant was prejudiced by the deficiency. *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct.App.1995); *Russell*, 118 Idaho at 67, 794 P.2d at 656; *Davis v. State*, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct.App.1989). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); *Russell*, 118 Idaho at 67, 794 P.2d at 656. To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Aragon*, 114 Idaho at 761, 760 P.2d at 1177; *Russell*, 118 Idaho at 67, 794 P.2d at 656. This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct.App.1994).

*Baker v. State*, 142 Idaho 411, 416, 128 P.3d 948 (Ct.App.2005).

It is not enough for a petitioner to simply allege his or her counsel's performance might have been better or might have contributed to conviction. Rather, the standard that must be met is to show actual unreasonable representation and actual prejudice. *Estes v. State*, 111 Idaho 430, 434, 725 P.2d 135 (1986). “A showing that defendant was denied the reasonably competent assistance of counsel is not sufficient by itself to sustain a reversal of the conviction. The defendant, in most cases, must make a showing that the conduct of counsel contributed to the conviction or the sentence imposed’.” *Id.* at 434; quoting *State v. Tucker*, 97 Idaho 4, 12, 539 P.2d 556 (1975).

Stuart's current post-conviction petition asserts ineffective assistance of counsel at trial, on appeal and/or in his prior post-conviction petitions in regards to the following issues: (1) admission of prior bad act testimony; (2) admission of statements by Stuart in violation of constitutional rights; (3) confusing and erroneous jury instructions; (4) insufficient evidence of murder by torture; (5) failure to instruct jury on included offense of second degree murder by torture; (6) failure to challenge criminal statute as unconstitutionally vague; (7) speedy trial violation; (8) prosecutorial misconduct; (9) violation of right to an impartial jury; (10) failure to record critical pretrial and trial proceedings and conferences held in chambers; (11) constitutional violations because of heightened courtroom security measures; and, (12) plea offer constitutional violations. Many of Stuart's current post-conviction claims, as listed above, were raised and addressed on direct appeal. Stuart seeks to again raise these issues by alleging that his trial counsel failed to “adequately raise, brief and argue” these issues. Even if timely raised, Stuart's ineffective assistance of counsel claims should be summarily dismissed.

Stuart's ineffective assistance of trial counsel claims and his ineffective assistance of appellate counsel claims have not been asserted within a reasonable time. Stuart was sentenced to death in December 1982. His first appeal was decided in 1986. He has been before the Supreme Court on four more occasions. Stuart has had two defense attorneys' offices represent him since the withdrawal of his trial attorney; attorney Scott Chapman was appointed in November 1995 and his present attorneys were appointed on January 17, 2002, almost one year prior to the filing of this successive post-conviction petition. By measurement from any point of reference, the trial and appellate ineffective assistance of counsel claims were not raised within a reasonable time after they were known or reasonably should have been known. Idaho Code 19-2719(5). *See e.g., Porter v. State*, 136 Idaho 257, 260, 32 P.3d 151,154 (2001).

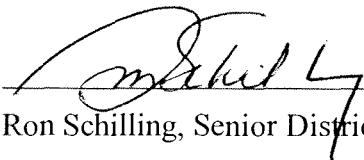
### CONCLUSION

The State's Motions for Summary Dismissal are granted in each case.

### ORDER

The State shall submit an appropriate order to the Court within fourteen days of this Opinion.

Dated this 8<sup>th</sup> day of March 2007.

  
\_\_\_\_\_  
Ron Schilling, Senior District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing OPINION ON 4<sup>th</sup> PETITION FOR POST-CONVICTION RELIEF was:

X mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 15<sup>th</sup> day of March 2007, to:

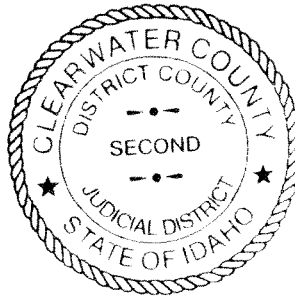
Lori Gilmore  
Courthouse Mail  
Orofino, ID 83544

L. Lamont Anderson  
PO Box 83720  
Boise, ID 83720-0010

Joan Fisher  
Oliver Loewy  
317 W 6<sup>th</sup> St., Ste., 207  
Moscow, ID 83843

Robin Christensen, Clerk

By: Sue K. Symmerton  
Deputy



1281-8443  
 FILED  
 CV02-4113  
 CV02-473  
 MAR 30 2006  
 John C. 1222 308 1st Dist. Court

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE  
 OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

GENE FRANCIS STUART	)	CASE NO. CV2002-00443,
	)	CV2002-00473
Plaintiff,	)	
	)	COURT MINUTES
Vs.	)	
	)	
STATE OF IDAHO, ET. AL.	)	
	)	
Defendant.	)	
_____		CASE NO. CR1981-008495
STATE OF IDAHO,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
GENE FRANCIS STUART,	)	
	)	
Defendant.	)	
_____		

District Judge Presiding: Ron Schilling  
 Joan Fisher and Oliver Lowery: Attorneys Gene Stuart  
 Lamont Anderson and Lori Gilmore: Attorneys for the State  
 Deputy Clerk: Sue K. Summerton  
 Date: 3/30/06 Tape: CD162 Time: 10:06 a.m.  
 Subject of Proceeding: Scheduling Conference

=====

FOOTAGE:

10:06 Court advises Ms. Fisher, Mr. Lowey, Mr. Anderson, and the court are present telephonically and Ms. Gilmore was present in person. Court advises that this is the time for a scheduling conference. Court has reviewed the briefs that were filed.

10:08 Mr. Lowey advises that there will be a motion for discovery filed.

10:08 Colloquy regarding scheduling a hearing.

Deputy Clerk – Sue K. Summerton  
 COURT MINUTES – 1

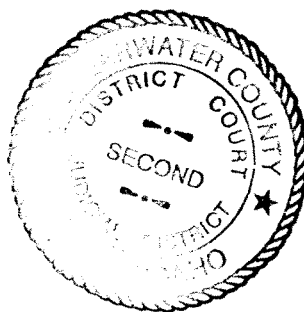
Approved:   
 District Judge

00000337

10:11 Court sets May 22, 2006 for argument on the motions. Hearing to be held at the State Maximum penitentiary.

10:13 Court sets this matter for 10:00 a.m. on 5/22/06 and the clerk will make the scheduling arrangements with the penitentiary.

10:15 Court in recess.



STATE OF IDAHO

County of Clearwater

I hereby certify that the foregoing is a full, true, and correct copy of an instrument as the same now remains on file and of record in my office

WITNESS my hand and official seal hereto affixed

this 10<sup>th</sup> day of April A.D., 20 06

ROBIN CHRISTENSEN, CLERK OF THE DISTRICT COURT EX OFFICIO AUDITOR & RECORDER

By Deputy Sue K. Summerton

Deputy Clerk – Sue K. Summerton  
COURT MINUTES – 2

Approved: [Signature]  
District Judge

00000338



FILED 5/18/06 AT  
4:00 p.m. OROFINO, IDAHO  
BY SIS

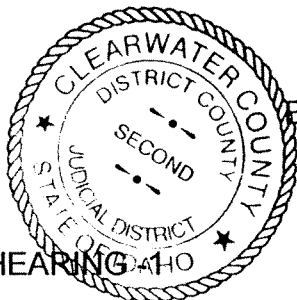
IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE  
OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

GENE FRANCIS STUART	)	CASE NO. CV2002-00443,
	)	CV2002-00473
Plaintiff,	)	
	)	NOTICE OF HEARING
Vs.	)	
	)	
STATE OF IDAHO, ET. AL.	)	
	)	
Defendant.	)	
<hr/>		
STATE OF IDAHO,	)	CASE NO. CR1981-008495
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
GENE FRANCIS STUART,	)	
	)	
Defendant.	)	
<hr/>		

NOTICE IS HEREBY GIVEN, that Monday, the 22<sup>nd</sup> day of May 2006, at the hour of 10:00 a.m., is hereby set as the time to hear motions in the above-entitled actions before the Honorable Ron Schilling, in the Courtroom of the Maximum Security Prison in Boise, ID.

DATED this 18<sup>th</sup> day of May, 2006.

ROBIN CHRISTENSEN, Clerk



By: Sue B. Summerton  
Deputy

NOTICE OF HEARING-1

00000339

I, the undersigned Deputy Clerk, do hereby certify that I delivered a copy of the foregoing document to the following person on the 18<sup>th</sup> day of May, 2006.

Lori Gilmore  
Clearwater County Prosecuting Attorney  
Courthouse Mail  
Orofino, ID 83544

L. Lamont Anderson  
Deputy Attorney General  
P.O. Box 83270  
Boise, ID 83720-0010

Joan Fisher  
Oliver W. Loewy  
Capital Habeas Unit  
Federal Defenders  
317 West 6<sup>th</sup> Street, Suite 204  
Moscow, ID 83843



ROBIN CHRISTENSEN, Clerk

By: Sue K. Summerton  
Deputy



NOTICE OF HEARING - 1

STATE OF IDAHO County of Clearwater  
I hereby Certify that the foregoing is a full, true, and  
correct copy of an instrument as the same now  
remains on file and of record in my office.

WITNESS my hand and official seal hereto affixed  
this 18<sup>th</sup> day of May AD. 2006  
ROBIN CHRISTENSEN, CLERK OF THE DISTRICT  
COURT EX OFFICIO AUDITOR & RECORDER

by Deputy Sue K. Summerton

00000340

Case No. 102-443  
 Filed 5/22/06  
 at 12:10 o'clock P M  
Robin Christensen  
 By SKS Clerk  
 Deputy

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE  
 OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

GENE FRANCIS STUART )  
 )  
 Plaintiff, )  
 )  
 Vs. )  
 )  
 STATE OF IDAHO, ET. AL. )  
 )  
 Defendant. )  
 )  
 \_\_\_\_\_ )  
 STATE OF IDAHO, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 GENE FRANCIS STUART, )  
 )  
 Defendant. )  
 )  
 \_\_\_\_\_ )

CASE NO. CV2002-00443,  
 CV2002-00473  
 COURT MINUTES  
 CASE NO. CR1981-008495

District Judge Presiding: Ron Schilling  
 Oliver Lowery: Attorney for Gene Stuart  
 Lamont Anderson and Lori Gilmore: Attorneys for the State  
 Deputy Clerk: Sue K. Summerton  
 Date: 5/22/06 Tape: Stuart Tapes: 1, 2, 3, and CD 4. Time: 10:18 a.m.  
 Subject of Proceeding: Motion hearing

=====

FOOTAGE:

001 Court advises Mr. Lowey, Mr. Anderson, Lori Gilmore and Gene Stuart are present  
 in court. Court explains now is the time to hear the Motion for Summary Dismissal.  
 118 Mr. Anderson argues.  
 263 Court remarks regarding the briefs that have been filed.

COURT MINUTES - 1

278 Mr. Lowery argues.

360 Court has sidebar.

702 Mr. Anderson argues.

791 Continued to Stuart Tape 2.

264 Mr. Lowery argues.

501 Continued to Stuart Tape 3.

001/435 Mr. Lowey continues argument.

10:45 a.m. Stuart CD 4

Court explains the issues with the tapes of this hearing. Court further explains that the SP numbers that were initially assigned to Mr. Stuart's cases have been converted to CV numbers due to a computer update at the court office.

Mr. Lowey reiterates his previous argument. Mr. Lowey moves for an evidentiary hearing to see if the female witnesses were available to the defense for interviews and an evidentiary hearing on the reasonable time to appeal issue. Mr. Lowey further moves for copies of trial files, police and sheriff's office files, in camera to be provided to the defense.

11:20 Mr. Anderson objects to Mr. Lowey's motions.

11:34 Mr. Lowey gives rebuttal argument.

11:38 Court allows counsel to provide additional citations by 6/1/06.

Mr. Lowey moves for another week to provide the citations to the court.

Court grants continuance to 6/8/06 to provide citations.

Mr. Lowey continues argument.

11:45 Court reiterates deadline for attorneys to file citations. Court takes this matter under advisement and advises a written decision will be provided.

Mr. Lowey continues argument.

COURT MINUTES - 2

00000342

Court advises not prepared to rule on Mr. Lowey's argument. Court orders all motions to be in writing.

Defendant leaves the courtroom.

Court advises issues to be raised outside of the prison guard.

Mr. Lowey argues motion to seal records, pleadings of 3/19/03, Affidavit in Support of Post conviction Relief.

Court grants motion to seal.

Mr. Anderson advises there are 4 affidavits to the pleading.

Mr. Lowey argues filing of declarations or affidavits.

Mr. Anderson argues in opposition to filing declarations or affidavits.

Mr. Lowey continues argument.

Court questions Mr. Lowey regarding the declarations or affidavits.

Mr. Lowey responds.

Mr. Anderson argues.

Court grants motion to file declarations or affidavits.

Mr. Anderson continues objection.


Mr. Lowey advises the court of each declaration or affidavit to be filed and their claim. Mr. Lowey addresses court regarding a settlement conference.

Court does not schedule a settlement conference however advises that the parties may meet to discuss settlement if they wish.

12:10 Court in recess.

Deputy Clerk – Sue K. Summerton  
COURT MINUTES – 3

Approved:

  
District Judge

00000343

SCANNED

04/26/07

CLERK - DISTRICT COURT  
CLEARWATER COUNTY  
IDAHO

2007/03/16 P 1:35

CASE NO. CWO2-443

BY SMS DEPT

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

GENE FRANCIS STUART,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

and

STATE OF IDAHO,

Plaintiff,

vs.

GENE FRANCIS STUART,

Defendant.

CASE NO. CV 2002-0000443

JUDGMENT DISMISSING CASE  
WITH PREJUDICE

CASE NO. CR81-0008495

JUDGMENT DISMISSING CASE  
WITH PREJUDICE

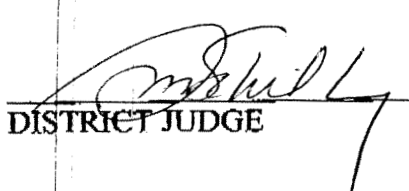
On March 12, 2007, this Court entered a Memorandum Opinion on Petition for Post-Conviction Relief and/or Writ of Habeas Corpus and Motion to Correct Illegal Sentence, to Vacate Sentence of Death and for New Sentencing Trial, granting the state's Motion for Summary Dismissal and dismissing this case with prejudice. Based upon the Court's Memorandum Opinion on Petition for Post-Conviction Relief and/or Writ of Habeas Corpus and Motion to Correct Illegal Sentence, to Vacate Sentence of Death and for New Sentencing Trial, and the Court being fully advised in the premises, IT IS

JUDGMENT DISMISSING CASE WITH PREJUDICE - 1

00000344

HEREBY ORDERED AND ADJUDGED that Petitioner's case is DISMISSED with prejudice.

DATED this 12<sup>th</sup> day of April, 2007.

  
DISTRICT JUDGE

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY That on or about the 18<sup>th</sup> day of April, 2007, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

L. LaMont Anderson  
Deputy Attorney General  
P.O. Box 83720  
Boise, ID 83720-0010  
Fax: (208) 334-2942

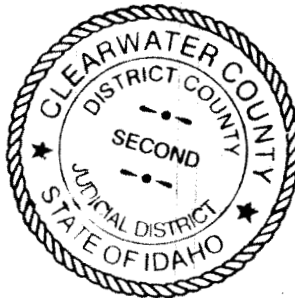
☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Mail  
☐ Facsimile

Joan M. Fisher  
Federal Defenders of  
Eastern Washington & Idaho  
317 W. 6<sup>th</sup> Street, Suite 204  
Moscow, ID 83843  
Fax: (208) 883-1472

☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Mail  
☐ Facsimile

Lori Gilmore  
Clearwater County Prosecutor  
Box 2627  
Orofino, ID 83544  
Fax: (208) 476-9710

☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Mail  
☐ Facsimile



Sue K. Summerton  
Deputy Clerk  
District Court  
Second Judicial District



Joan M. Fisher  
Idaho State Bar No. 2854  
Oliver W. Loewy  
Limited Admission  
Capital Habeas Unit  
Federal Defender Services of Idaho  
317 West 6<sup>th</sup> Street, Suite 204  
Moscow, ID 83843  
208-883-0180

CLERK OF DISTRICT COURT  
CLEARWATER COUNTY  
IDAHO

2007 APR 23 10:42  
CR81-8495  
SLO

Attorneys for Petitioner Gene F. Stuart

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

<b>GENE FRANCIS STUART,</b>	)	
	)	<b>Case Nos. CR81-0008495</b>
<b>Petitioner-Appellant,</b>	)	
	)	
<b>v.</b>	)	<b>MOTION THAT COSTS OF</b>
	)	<b>APPEAL BE AT COUNTY</b>
<b>STATE OF IDAHO,</b>	)	<b>EXPENSE</b>
	)	
<b>Respondent.</b>	)	
_____	)	

Mr. Gene F. Stuart ("Petitioner"), pursuant to Idaho Appellate Rule 17 and Idaho Code Section 19-4904, moves that the Court order that all costs of appeal, including the costs of the Reporter's Transcript and the Clerk's Record, shall be at county expense. In support of this motion, Mr. Stuart states as follows:

1. Since October, 1981, Idaho courts have determined that Mr. Stuart is indigent and unable to pay litigation costs in the prosecution, appeals, and postconviction petitions relating to his prosecution in the Second Judicial District, County of Clearwater, District Court Case No. CV02-00443. Mr. Stuart has been incarcerated since September, 1981.

**MOTION THAT COSTS OF  
APPEAL BE AT COUNTY EXPENSE - 1**

00000347

2. To the best of undersigned counsel's knowledge Mr. Stuart remains and shall continue to remain throughout the appellate proceedings in the instant matter an indigent person with no means of support or ability to pay the costs of these proceedings.

3. The federal and state constitutional rights to counsel, to due process, to equal protection, and against cruel and unusual punishment guarantee Mr. Stuart the right to appeal the denial of postconviction relief in his capital case. U.S. Const. amend. VI, VII, XIV; Idaho Const. art. I, §§ 2, 6, 13

WHEREFORE, Petitioner respectfully requests that the Court enter an Order directing that all costs of appeal, including the costs of the Reporter's Transcript and the Clerk's Record, shall be at county expense.

Dated this 23<sup>d</sup> day of April 2007.



Joan M. Fisher  
Oliver W. Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
208-883-0180

**CERTIFICATE OF SERVICE**

I, Oliver W. Loewy, hereby certify that on the 23<sup>rd</sup> day of April, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, first class postage prepaid where applicable, addressed to:

Lori Gilmore  
Clearwater County Prosecuting Attorney  
P.O. Box 2627  
Orofino, Idaho 83544


☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile  
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L. LaMont Anderson  
Attorney General's Office  
P.O. Box 83720  
Boise, Idaho 83720-0010

☒ U.S. Mail  
☐ Hand Delivery  
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☐ Overnight Mail

Cindy Leonhardt  
Court Reporter  
M&M Court Reporting Service Inc.  
P.O. Box 2636  
Boise, ID 83701-2636

☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile  
☐ Overnight Mail

  
\_\_\_\_\_

00000349

Joan M. Fisher  
Idaho State Bar No. 2854  
Oliver W. Loewy  
Limited Admission  
Capital Habeas Unit  
Federal Defender Services of Idaho  
317 West 6<sup>th</sup> Street, Suite 204  
Moscow, ID 83843  
208-883-0180

CLERK OF DISTRICT COURT  
DISTRICT COURT  
CLEARWATER COUNTY  
IDAHO

RECEIVED  
NOV 20 1998  
CV 02-443  
SKS

Attorneys for Petitioner Gene F. Stuart

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

<b>GENE FRANCIS STUART,</b>	)	
	)	<b>Case Nos. CV02-00443</b>
<b>Petitioner-Appellant,</b>	)	
	)	
<b>v.</b>	)	<b>NOTICE OF APPEAL</b>
	)	
<b>STATE OF IDAHO,</b>	)	
	)	
<b>Respondent.</b>	)	
_____	)	

TO: PROSECUTING ATTORNEY FOR THE COUNTY OF  
CLEARWATER, STATE OF IDAHO, THE ATTORNEY GENERAL  
FOR THE STATE OF IDAHO, AND THE CLERK OF THE DISTRICT  
COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF  
IDAHO.

Pursuant to Idaho Appellate Rules 11(a)(1), 11(a)(7), 11(c)(9), and 17, NOTICE IS  
HEREBY GIVEN THAT:

1. Gene F. Stuart, the above named appellant, appeals against the above named  
respondent to the Idaho Supreme Court from the Memorandum Opinion On Petition For Post  
Conviction Relief And/Or Writ Of Habeas Corpus and Motion To Correct Illegal Sentence, To

**Notice of Appeal - 1**

00000350

Vacate Sentence Of Death And For New Sentencing Trial filed in the above entitled action on March 12, 2007, Honorable Ron Schilling, Senior District Judge, presiding.

2. Mr. Stuart is entitled to appeal to the Idaho Supreme Court, and the order described in paragraph one is an appealable order pursuant to Idaho Appellate Rule 11(a)(1), 11(a)(7), and 11(c)(9).

3. Mr. Stuart intends to raise various issues in his appeal, including but not limited to:

a. Whether this Court's holding in *Porter v. State*, 140 Idaho 780, 783, 102 P.3d 1099, 1102 (2004), followed by the court below, that *Schriro v. Summerlin*, 532 U.S. 348 (2004), precludes it from retroactively applying *Ring v. Arizona*, 536 U.S. 584 (2002), reflects a fundamental misunderstanding of its authority to give retroactive effect to a broader range of cases than permitted by federal retroactivity doctrine; and

b. Whether the retroactive application of Idaho Code §19-2719 to this case violates the state and federal constitutions' prohibition against *ex post facto* laws.

4. Mr. Stuart requests that a Reporter's Transcript of all hearings in this matter be prepared. He requests that it *not* be prepared in compressed format as described in Idaho Appellate Rule 26.

5. Mr. Stuart requests that in addition to those items automatically included pursuant to Idaho Appellate Rule 28, that the Clerk's Record include *all* papers filed by each party and *all* orders and minute entries.

6. The undersigned certifies:

a. That the Honorable Ronald D. Schilling is a Senior District Judge and, as such, does not have an assigned court reporter; that on this 23rd day of April, 2007, a copy of this Notice of Appeal has been served on each court reporter who recorded hearings in this matter and whose identity is now available to undersigned counsel; that undersigned counsel has made a good faith effort to learn the identity of the court reporter for the May 22, 2006, hearing, but that Judge Schilling, the clerk's office of the Clearwater County District Court, and opposing counsel were unable to provide that court reporter's identity today; that service on the remaining court reporter(s) was accomplished by placing a copy in a properly addressed envelope, first class postage affixed, and mailing that envelope via the United States Postal Service; and that undersigned counsel will determine as quickly as possible the identity of the May 22, 2006, court reporter, immediately serve a copy of this Notice of Appeal on him or her, and also immediately advise this Court of same. See Idaho Appellate Rule 20.

b. That on this 23rd day of April, 2007, a copy of this Notice of Appeal has been served on the court reporter for the Honorable Ron Schilling by placing the copy in a properly addressed envelope, first class postage affixed, and mailing that envelope via the United States Postal Service. See Idaho Appellate Rule 20.

c. That Mr. Stuart is exempt from paying the estimated reporter's transcript fees because he was indigent before trial and has been ever since;

d. That Mr. Stuart is exempt from paying the estimated clerk's record fees because he was indigent before trial and has been ever since;

e. That Mr. Stuart is exempt from paying the appellate filing fee because he was indigent before trial and has been ever since; and

f. That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20, namely, the Clearwater County Prosecuting Attorney and the Attorney General for the State of Idaho.

Dated this 22 day of April 2007.



Joan M. Fisher  
Oliver Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
208-883-0180

**CERTIFICATE OF SERVICE**

I, JULIE BRUDIE, hereby certify that on the 25<sup>th</sup> day of April, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, first class postage prepaid where applicable, addressed to:

Lori Gilmore  
Clearwater County Prosecuting Attorney  
P.O. Box 2627  
Orofino, Idaho 83544

☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile  
☐ Overnight Mail

L. LaMont Anderson  
Attorney General's Office  
P.O. Box 83720  
Boise, Idaho 83720-0010

☒ U.S. Mail  
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Cindy Leonhardt  
Court Reporter  
M&M Court Reporting Service Inc.  
P.O. Box 2636  
Boise, ID 83701-2636

☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile  
☐ Overnight Mail

Julie Brudie



Joan M. Fisher  
Idaho State Bar No. 2854  
Oliver W. Loewy  
Limited Admission  
Capital Habeas Unit  
Federal Defender Services of Idaho  
317 West 6<sup>th</sup> Street, Suite 204  
Moscow, ID 83843  
208-883-0180

SECOND JUDICIAL DISTRICT COURT  
CLEARWATER COUNTY  
ID  
MAR 23 PM 4:40  
CR81-8495  
SJS

Attorneys for Petitioner Gene F. Stuart

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

<b>GENE FRANCIS STUART,</b>	)	
	)	<b>Case Nos. CR81-0008495</b>
<b>Petitioner-Appellant,</b>	)	
	)	
<b>v.</b>	)	<b>NOTICE OF APPEAL</b>
	)	
<b>STATE OF IDAHO,</b>	)	
	)	
<b>Respondent.</b>	)	
_____	)	

TO: PROSECUTING ATTORNEY FOR THE COUNTY OF  
CLEARWATER, STATE OF IDAHO, THE ATTORNEY GENERAL  
FOR THE STATE OF IDAHO, AND THE CLERK OF THE DISTRICT  
COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF  
IDAHO.

Pursuant to Idaho Appellate Rules 11(a)(1), 11(a)(7), 11(c)(9), and 17, NOTICE IS  
HEREBY GIVEN THAT:

1. Gene F. Stuart, the above named appellant, appeals against the above named  
respondent to the Idaho Supreme Court from the Memorandum Opinion On Petition For Post  
Conviction Relief And/Or Writ Of Habeas Corpus and Motion To Correct Illegal Sentence, To

**Notice of Appeal - 1**

00000355

Vacate Sentence Of Death And For New Sentencing Trial ("*Order*") filed in the above entitled action on March 12, 2007, Honorable Ronald D. Schilling, Senior District Judge, presiding.

2. Mr. Stuart notes that while the caption on the *Order* does not list Case Number CR81-0008495, the case number assigned to his Motion To Correct Illegal Sentence, the substance of the *Order* appears to address that motion. *See Order* at 5-8.

3. Mr. Stuart is entitled to appeal to the Idaho Supreme Court, and the order described in paragraph one is an appealable order pursuant to Idaho Appellate Rule 11(a)(1), 11(a)(7), and 11(c)(9).

4. Mr. Stuart intends to raise various issues in his appeal, including but not limited to:

- a. Whether this Court's holding in *Porter v. State*, 140 Idaho 780, 783, 102 P.3d 1099, 1102 (2004), followed by the court below, that *Schriro v. Summerlin*, 532 U.S. 348 (2004), precludes it from retroactively applying *Ring v. Arizona*, 536 U.S. 584 (2002), reflects a fundamental misunderstanding of its authority to give retroactive effect to a broader range of cases than permitted by federal retroactivity doctrine;
- b. Whether the retroactive application of Idaho Code §19-2719 to this case violates the state and federal constitutions' prohibition against *ex post facto* laws; and
- c. Whether Idaho Code §19-2719 violates the Idaho constitution's separation of power's doctrine inasmuch as it removes from the district courts the

jurisdiction to reach the merits of postconviction petitioners filed outside that statute's time requirements.

5. Mr. Stuart requests that a Reporter's Transcript of all hearings in this matter be prepared. He requests that it *not* be prepared in compressed format as described in Idaho Appellate Rule 26.

6. Mr. Stuart requests that in addition to those items automatically included pursuant to Idaho Appellate Rule 28, that the Clerk's Record include *all* papers filed by each party and *all* orders and minute entries.

7. The undersigned certifies:

a. That the Honorable Ronald D. Schilling is a Senior District Judge and, as such, does not have an assigned court reporter; that on this 23rd day of April, 2007, a copy of this Notice of Appeal has been served on each court reporter who recorded hearings in this matter and whose identity is now available to undersigned counsel; that undersigned counsel has made a good faith effort to learn the identity of the court reporter for the May 22, 2006, hearing, but that Judge Schilling, the clerk's office of the Clearwater County District Court, and opposing counsel were unable to provide that court reporter's identity today; that service on the remaining court reporter(s) was accomplished by placing a copy in a properly addressed envelope, first class postage affixed, and mailing that envelope via the United States Postal Service; and that undersigned counsel will determine as quickly as possible the identity of the May 22, 2006, court reporter, immediately serve a copy of this Notice of Appeal on him or her, and also immediately advise this Court of same. See Idaho Appellate Rule 20.

b. That Mr. Stuart is exempt from paying the estimated reporter's transcript fees because he was indigent before trial and has been ever since;

c. That Mr. Stuart is exempt from paying the estimated clerk's record fees because he was indigent before trial and has been ever since;

d. That Mr. Stuart is exempt from paying the appellate filing fee because he was indigent before trial and has been ever since; and

e. That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20, namely, the Clearwater County Prosecuting Attorney and the Attorney General for the State of Idaho.

Dated this 22 day of April 2007.



Joan M. Fisher  
Oliver W. Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
208-883-0180

**CERTIFICATE OF SERVICE**

I, Oliver W Loewy, hereby certify that on the 23<sup>rd</sup> day of April, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, first class postage prepaid where applicable, addressed to:

Lori Gilmore  
Clearwater County Prosecuting Attorney  
P.O. Box 2627  
Orofino, Idaho 83544

☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile  
☐ Overnight Mail

L. LaMont Anderson  
Attorney General's Office  
P.O. Box 83720  
Boise, Idaho 83720-0010

☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile  
☐ Overnight Mail

Cindy Leonhardt  
Court Reporter  
M&M Court Reporting Service Inc.  
P.O. Box 2636  
Boise, ID 83701-2636

☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile  
☐ Overnight Mail

  
\_\_\_\_\_

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2007 APR 30 P 3:48

CASE NO.

CR81-8495

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

GENE FRANCIS STUART,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

Case No. CR81-0008495


ORDER

Having duly considered Petitioner's *Motion That Costs Of Appeal Be At County Expense*,

IT IS HEREBY ORDERED THAT:

All costs of appeal to the Idaho Supreme Court in the instant matter, including the costs of the Reporter's Transcript and the Clerk's Record, shall be at county expense.

Entered this 25<sup>th</sup> day of April, 2007.

  
RONALD D. SCHILLING  
District Judge

ORDER -1

00000360

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a full, true and correct copy of the foregoing Order was personally delivered or mailed this 30<sup>th</sup> day of April, 2007, by first-class mail with prepaid postage to the following:

Joan M. Fisher  
Oliver Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
317 West 6th Street, Suite 204  
Moscow, Idaho 83843

☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile  
☐ Overnight Mail

Lori Gilmore  
Clearwater County Prosecuting Attorney  
P.O. Box 2627  
Orofino, Idaho 83544

☐ U.S. Mail  
☒ Hand Delivery  
☐ Facsimile  
☐ Overnight Mail

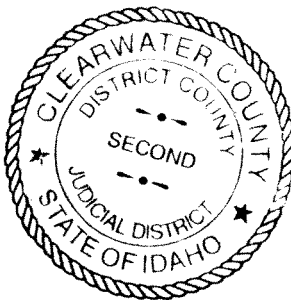
L. LaMont Anderson  
Attorney General's Office  
P.O. Box 83720  
Boise, Idaho 83720-0010

☒ U.S. Mail  
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Cindy Leonhardt  
Court Reporter  
M&M Court Reporting Service Inc.  
P.O. Box 2636  
Boise, ID 83701-2636

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☐ Hand Delivery  
☐ Facsimile  
☐ Overnight Mail

Robin Christensen



By: Sue K. Summerton  
Deputy

ORDER -2

00000361

Joan M. Fisher  
Idaho State Bar No. 2854  
Oliver W. Loewy  
Limited Admission  
Capital Habeas Unit  
Federal Defender Services of Idaho  
317 West 6<sup>th</sup> Street, Suite 204  
Moscow, ID 83843  
208-883-0180

JOAN OLIVIER FENSON  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
IDAHO

2007 MAY -8 A 11:12

CASE NO. CR81-8495

BY SLB DEPUTY

Attorneys for Petitioner Gene F. Stuart

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

**GENE FRANCIS STUART,** )  
 )  
 **Petitioner-Appellant,** )  
 )  
 **v.** )  
 )  
 **STATE OF IDAHO,** )  
 )  
 **Respondent.** )  
 )

**Case Nos. CR81-0008495**

**AMENDED NOTICE OF APPEAL**

TO: PROSECUTING ATTORNEY FOR THE COUNTY OF  
CLEARWATER, STATE OF IDAHO, THE ATTORNEY GENERAL  
FOR THE STATE OF IDAHO, AND THE CLERK OF THE DISTRICT  
COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF  
IDAHO.

Pursuant to Idaho Appellate Rules 11(c)(1), 11(c)(4), 11(c)(6), 11(c)(8), and

11(c)(9), 17, and 17(l) NOTICE IS HEREBY GIVEN THAT:

1. On April 23, 2007, Gene F. Stuart, the above named appellant, filed his Notice of  
Appeal from the Memorandum Opinion and Order entered on March 12, 2007, by the Honorable

**Amended Notice of Appeal - 1**

00000362



Ronald D. Schilling, Senior District Judge. The next day, undersigned counsel received the Judgment Dismissing Case with Prejudice ("Judgment") entered on April 18, 2007. Mr. Stuart files this instant Amended Notice of Appeal from that Judgment.

2. Mr. Stuart is entitled to appeal to the Idaho Supreme Court, and the Judgment is appealable pursuant to Idaho Appellate Rules 11(c)(1), 11(c)(4), 11(c)(6), 11(c)(8), 11(c)(9).

3. Mr. Stuart intends to raise various issues in his appeal, including but not limited to:

a. Whether this Court's holding in *Porter v. State*, 140 Idaho 780, 783, 102 P.3d 1099, 1102 (2004), followed by the court below, that *Schriro v. Summerlin*, 532 U.S. 348 (2004), precludes it from retroactively applying *Ring v. Arizona*, 536 U.S. 584 (2002), reflects a fundamental misunderstanding of its authority to give retroactive effect to a broader range of cases than permitted by federal retroactivity doctrine;

b. Whether the retroactive application of Idaho Code §19-2719 to this case violates the state and federal constitutions' prohibition against *ex post facto* laws; and

c. Whether Idaho Code §19-2719 violates the Idaho constitution's separation of power's doctrine inasmuch as it removes from the district courts the jurisdiction to reach the merits of postconviction petitioners filed outside that statute's time requirements.

4. Mr. Stuart requests that a Reporter's Transcript of all hearings in this matter be prepared. He requests that it *not* be prepared in compressed format as described in Idaho Appellate Rule 26.

5. Mr. Stuart requests that in addition to those items automatically included pursuant to Idaho Appellate Rule 28, that the Clerk's Record include *all* papers filed by each party and *all* orders and minute entries.

6. Please note that there are sealed documents filed in his case. Mr. Stuart respectfully requests that those documents **remain sealed** and be sent to the Supreme Court as **sealed exhibits** to this record on appeal in this matter.

7. The undersigned certifies:

a. That the Honorable Ronald D. Schilling is a Senior District Judge and, as such, does not have an assigned court reporter; that on this 7<sup>th</sup> day of May, 2007, a copy of this Notice of Appeal has been served on each court reporter who recorded hearings in this matter.

b. That the District Court electronically recorded some hearings for which no court reporter was present, including those held on January 6, 2006, and May 22, 2006.

c. That Mr. Stuart is exempt from paying the estimated reporter's transcript fees because he was indigent before trial and has been ever since;

d. That Mr. Stuart is exempt from paying the estimated clerk's record fees because he was indigent before trial and has been ever since;

e. That Mr. Stuart is exempt from paying the appellate filing fee because he was indigent before trial and has been ever since; and

f. That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20, namely, the Clearwater County Prosecuting Attorney and the Attorney General for the State of Idaho.

Dated this 7<sup>th</sup> day of May, 2007.



Joan M. Fisher  
Oliver W. Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
208-883-0180

**CERTIFICATE OF SERVICE**

I, Julie Brudie hereby certify that on the 17<sup>th</sup> day of May, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, first class postage prepaid where applicable, addressed to:

Lori Gilmore  
Clearwater County Prosecuting Attorney  
P.O. Box 2627  
Orofino, Idaho 83544

☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile  
☐ Overnight Mail

L. LaMont Anderson  
Attorney General's Office  
P.O. Box 83720  
Boise, Idaho 83720-0010

☒ U.S. Mail  
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☐ Overnight Mail

Cindy Leonhardt  
Court Reporter  
M&M Court Reporting Service Inc.  
P.O. Box 2636  
Boise, ID 83701-2636

☒ U.S. Mail  
☐ Hand Delivery  
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☐ Overnight Mail

Julie Brudie

Joan M. Fisher  
Idaho State Bar No. 2854  
Oliver W. Loewy  
Limited Admission  
Capital Habeas Unit  
Federal Defender Services of Idaho  
317 West 6<sup>th</sup> Street, Suite 204  
Moscow, ID 83843  
208-883-0180

REINCK, J. SEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
IDAHO

2007 MAY -8 A 11:12

CASE NO. 0202-443

BY SKS DEPO

Attorneys for Petitioner Gene F. Stuart

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

**GENE FRANCIS STUART,**

**Petitioner-Appellant,**

**v.**

**STATE OF IDAHO,**

**Respondent.**

**Case Nos. CV02-00443**

**AMENDED NOTICE OF APPEAL**

TO: PROSECUTING ATTORNEY FOR THE COUNTY OF  
CLEARWATER, STATE OF IDAHO, THE ATTORNEY GENERAL  
FOR THE STATE OF IDAHO, AND THE CLERK OF THE DISTRICT  
COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF  
IDAHO.

Pursuant to Idaho Appellate Rules 11(a)(1), 11(a)(7), 11(c)(9), 17, and 17(l)

NOTICE IS HEREBY GIVEN THAT:

1. On April 23, 2007, Gene F. Stuart, the above named appellant, filed his Notice of Appeal from the Memorandum Opinion and Order entered on March 12, 2007, by the Honorable Ron Schilling, Senior District Judge. The next day, undersigned counsel received the Judgment

**Amended Notice of Appeal - 1**

00000367

Dismissing Case with Prejudice (“Judgment”) entered on April 18, 2007. Mr. Stuart files this instant Amended Notice of Appeal from that Judgment.

2. Mr. Stuart is entitled to appeal to the Idaho Supreme Court, and the Judgment is appealable pursuant to Idaho Appellate Rules 11(a)(1), 11(a)(7), 11(c)(9).

3. Mr. Stuart intends to raise various issues in his appeal, including but not limited to:

a. Whether this Court’s holding in *Porter v. State*, 140 Idaho 780, 783, 102 P.3d 1099, 1102 (2004), followed by the court below, that *Schriro v. Summerlin*, 532 U.S. 348 (2004), precludes it from retroactively applying *Ring v. Arizona*, 536 U.S. 584 (2002), reflects a fundamental misunderstanding of its authority to give retroactive effect to a broader range of cases than permitted by federal retroactivity doctrine; and

b. Whether the retroactive application of Idaho Code §19-2719 to this case violates the state and federal constitutions’ prohibition against *ex post facto* laws.

4. Mr. Stuart requests that a Reporter’s Transcript of all hearings in this matter be prepared. He requests that it *not* be prepared in compressed format as described in Idaho Appellate Rule 26.

5. Mr. Stuart requests that in addition to those items automatically included pursuant to Idaho Appellate Rule 28, that the Clerk’s Record include *all* papers filed by each party and *all* orders and minute entries.

6. Please note that there are sealed documents filed in this case. Mr. Stuart respectfully requests that those documents **remain sealed** and be sent to the Supreme Court as **sealed exhibits** to the record on appeal in this matter.

7. The undersigned certifies:

a. That the Honorable Ronald D. Schilling is a Senior District Judge and, as such, does not have an assigned court reporter; that on this 7<sup>th</sup> day of May, 2007, a copy of this Notice of Appeal has been served on each court reporter who recorded hearings in this matter.

b. That the District Court electronically recorded some hearings for which no court reporter was present, including those held on January 6, 2006, and May 22, 2006.

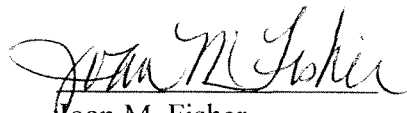
c. That Mr. Stuart is exempt from paying the estimated reporter's transcript fees because he was indigent before trial and has been ever since;

d. That Mr. Stuart is exempt from paying the estimated clerk's record fees because he was indigent before trial and has been ever since;

e. That Mr. Stuart is exempt from paying the appellate filing fee because he was indigent before trial and has been ever since; and

f. That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20, namely, the Clearwater County Prosecuting Attorney and the Attorney General for the State of Idaho.

Dated this 7<sup>th</sup> day of May 2007.



Joan M. Fisher  
Oliver Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
208-883-0180

**CERTIFICATE OF SERVICE**

I, Julie Brudie, hereby certify that on the 17<sup>th</sup> day of May, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, first class postage prepaid where applicable, addressed to:

Lori Gilmore  
Clearwater County Prosecuting Attorney  
P.O. Box 2627  
Orofino, Idaho 83544

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☐ Hand Delivery  
☐ Facsimile  
☐ Overnight Mail

L. LaMont Anderson  
Attorney General's Office  
P.O. Box 83720  
Boise, Idaho 83720-0010

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Court Reporter  
M&M Court Reporting Service Inc.  
P.O. Box 2636  
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☐ Overnight Mail

Julie Brudie



Joan M. Fisher  
Idaho State Bar No. 2854  
Oliver W. Loewy  
Limited Admission  
Capital Habeas Unit  
Federal Defender Services of Idaho  
317 West 6<sup>th</sup> Street, Suite 204  
Moscow, ID 83843  
208-883-0180

CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
IDAHO

2007 JAN -6 A. 11: 32

CR81-3495

BY SKS DEPT.

Attorneys for Petitioner Gene F. Stuart

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

<b>GENE FRANCIS STUART,</b>	)	
	)	
<b>Petitioner-Appellant,</b>	)	<b>Case Nos. CR81-0008495</b>
	)	
<b>v.</b>	)	<b>SECOND AMENDED</b>
	)	<b>NOTICE OF APPEAL</b>
	)	
<b>STATE OF IDAHO,</b>	)	
	)	
<b>Respondent.</b>	)	
_____	)	

TO: PROSECUTING ATTORNEY FOR THE COUNTY OF  
CLEARWATER, STATE OF IDAHO, THE ATTORNEY GENERAL  
FOR THE STATE OF IDAHO, AND THE CLERK OF THE DISTRICT  
COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF  
IDAHO.

Pursuant to Idaho Appellate Rules 11(a)(1), 11(a)(7), 11(c)(9), 17, and 17(l)

NOTICE IS HEREBY GIVEN THAT:

1. This Second Amended Notice of Appeal is filed in compliance with the Idaho  
Supreme Court's May 23, 2007, Order directing that Appellant, Gene F. Stuart, file within  
fourteen (14) days, an Amended Notice of Appeal "specifying by date and title the hearing(s)

Second Amended Notice of Appeal - 1

00000371

required to be transcribed for purposes of this Appeal.” The particular dates and related matters are set out in paragraphs 4 and 7 below.

2. Mr. Stuart is entitled to appeal to the Idaho Supreme Court, and the Judgment is appealable pursuant to Idaho Appellate Rules 11(a)(1), 11(a)(7), 11(c)(9).

3. Mr. Stuart intends to raise various issues in his appeal, including but not limited to:

a. Whether this Court’s holding in *Porter v. State*, 140 Idaho 780, 783, 102 P.3d 1099, 1102 (2004), followed by the court below, that *Schriro v. Summerlin*, 532 U.S. 348 (2004), precludes it from retroactively applying *Ring v. Arizona*, 536 U.S. 584 (2002), reflects a fundamental misunderstanding of its authority to give retroactive effect to a broader range of cases than permitted by federal retroactivity doctrine; and

b. Whether the retroactive application of Idaho Code §19-2719 to this case violates the state and federal constitutions’ prohibition against *ex post facto* laws.

4. Mr. Stuart requests that a Reporter’s Transcript of *all* hearings be prepared in this matter, including the following hearings:

a. The March 3, 2004, Scheduling Conference held in Boise, Idaho, during which Appellant’s Motion to Stay Proceedings was considered and ruled on. This hearing was reported by Cindy L. Leonhardt, C.S.R., and a transcript of the hearing has previously been prepared.

b. The January 6, 2006, telephonic Scheduling Conference. This hearing was not reported, but it was recorded electronically on tape #C3741, Clearwater County District Court, Orofino, Idaho.

- c. The March 30, 2006, telephonic Scheduling Conference. This hearing was not reported, but it was recorded electronically on tape #CD162, Clearwater County District Court, Orofino, Idaho.
- d. The May 22, 2006, Motion Hearing. This hearing was not reported, but it was recorded electronically by Court staff on tapes, tape numbers unknown, at the Idaho Maximum Security Institution, Boise, Idaho.
- 5. Mr. Stuart requests that the Reporter's Transcript *not* be prepared in compressed format as described in Idaho Appellate Rule 26.
- 6. Mr. Stuart requests that in addition to those items automatically included pursuant to Idaho Appellate Rule 28, that the Clerk's Record include *all* papers filed by each party and *all* orders and minute entries.
- 6. Please note that there are sealed documents filed in this case. Mr. Stuart respectfully requests that those documents **remain sealed** and be sent to the Supreme Court as **sealed exhibits** to the record on appeal in this matter.
- 7. The undersigned certifies:
  - a. That the Honorable Ronald D. Schilling is a Senior District Judge and, as such, does not have an assigned court reporter; that on this 4<sup>th</sup> day of June, 2007, a copy of this Second Amended Notice of Appeal has been served on each court reporter who recorded hearings in this matter.
  - b. That the District Court electronically recorded some hearings for which no court reporter was present, including those held on January 6, 2006, March 30, 2006, and May 22, 2006.

c. That Mr. Stuart is exempt from paying the estimated reporter's transcript fees because he was indigent before trial and has been ever since;

d. That Mr. Stuart is exempt from paying the estimated clerk's record fees because he was indigent before trial and has been ever since;

e. That Mr. Stuart is exempt from paying the appellate filing fee because he was indigent before trial and has been ever since; and

f. That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20, namely, the Clearwater County Prosecuting Attorney and the Attorney General for the State of Idaho.

Dated this 4<sup>th</sup> day of June, 2007.



Joan M. Fisher  
Oliver Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
208-883-0180

**CERTIFICATE OF SERVICE**

I, Julie Brudie, hereby certify that on the 5<sup>th</sup> day of June, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, first class postage prepaid where applicable, addressed to:

Lori Gilmore  
Clearwater County Prosecuting Attorney  
P.O. Box 2627  
Orofino, Idaho 83544

☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile  
☐ Overnight Mail

L. LaMont Anderson  
Attorney General's Office  
P.O. Box 83720  
Boise, Idaho 83720-0010

☒ U.S. Mail  
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Cindy Leonhardt  
Court Reporter  
M&M Court Reporting Service Inc.  
P.O. Box 2636  
Boise, ID 83701-2636

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Julie Brudie

Joan M. Fisher  
Idaho State Bar No. 2854  
Oliver W. Loewy  
Limited Admission  
Capital Habeas Unit  
Federal Defender Services of Idaho  
317 West 6<sup>th</sup> Street, Suite 204  
Moscow, ID 83843  
208-883-0180

CLERK-DISTRICT COURT  
CLERK-DISTRICT COURT  
CLERK-DISTRICT COURT

2007-06-11 11:31

CV02-00443  
JCS

Attorneys for Petitioner Gene F. Stuart

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

<b>GENE FRANCIS STUART,</b>	)	
	)	<b>Case Nos. CV02-00443</b>
<b>Petitioner-Appellant,</b>	)	
	)	
<b>v.</b>	)	<b>SECOND AMENDED</b>
	)	<b>NOTICE OF APPEAL</b>
	)	
<b>STATE OF IDAHO,</b>	)	
	)	
<b>Respondent.</b>	)	
_____	)	

TO: PROSECUTING ATTORNEY FOR THE COUNTY OF  
CLEARWATER, STATE OF IDAHO, THE ATTORNEY GENERAL  
FOR THE STATE OF IDAHO, AND THE CLERK OF THE DISTRICT  
COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF  
IDAHO.

Pursuant to Idaho Appellate Rules 11(a)(1), 11(a)(7), 11(c)(9), 17, and 17(l)

NOTICE IS HEREBY GIVEN THAT:

1. This Second Amended Notice of Appeal is filed in compliance with the Idaho  
Supreme Court's May 23, 2007, Order directing that Appellant, Gene F. Stuart, file within  
fourteen (14) days, an Amended Notice of Appeal "specifying by date and title the hearing(s)

Second Amended Notice of Appeal - 1

00000376

required to be transcribed for purposes of this Appeal.” The particular dates and related matters are set out in paragraphs 4 and 7 below.

2. Mr. Stuart is entitled to appeal to the Idaho Supreme Court, and the Judgment is appealable pursuant to Idaho Appellate Rules 11(a)(1), 11(a)(7), 11(c)(9).

3. Mr. Stuart intends to raise various issues in his appeal, including but not limited to:

a. Whether this Court’s holding in *Porter v. State*, 140 Idaho 780, 783, 102 P.3d 1099, 1102 (2004), followed by the court below, that *Schriro v. Summerlin*, 532 U.S. 348 (2004), precludes it from retroactively applying *Ring v. Arizona*, 536 U.S. 584 (2002), reflects a fundamental misunderstanding of its authority to give retroactive effect to a broader range of cases than permitted by federal retroactivity doctrine; and

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4. Mr. Stuart requests that a Reporter’s Transcript of *all* hearings be prepared in this matter, including the following hearings:

a. The March 3, 2004, Scheduling Conference held in Boise, Idaho, during which Appellant’s Motion to Stay Proceedings was considered and ruled on. This hearing was reported by Cindy L. Leonhardt, C.S.R., and a transcript of the hearing has previously been prepared.

b. The January 6, 2006, telephonic Scheduling Conference. This hearing was not reported, but it was recorded electronically on tape #C3741, Clearwater County District Court, Orofino, Idaho.

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- d. The May 22, 2006, Motion Hearing. This hearing was not reported, but it was recorded electronically by Court staff on tapes, tape numbers unknown, at the Idaho Maximum Security Institution, Boise, Idaho.
- 5. Mr. Stuart requests that the Reporter's Transcript *not* be prepared in compressed format as described in Idaho Appellate Rule 26.
- 6. Mr. Stuart requests that in addition to those items automatically included pursuant to Idaho Appellate Rule 28, that the Clerk's Record include *all* papers filed by each party and *all* orders and minute entries.
- 6. Please note that there are sealed documents filed in this case. Mr. Stuart respectfully requests that those documents **remain sealed** and be sent to the Supreme Court as **sealed exhibits** to the record on appeal in this matter.
- 7. The undersigned certifies:
  - a. That the Honorable Ronald D. Schilling is a Senior District Judge and, as such, does not have an assigned court reporter; that on this 4<sup>th</sup> day of June, 2007, a copy of this Second Amended Notice of Appeal has been served on each court reporter who recorded hearings in this matter.
  - b. That the District Court electronically recorded some hearings for which no court reporter was present, including those held on January 6, 2006, March 30, 2006, and May 22, 2006.



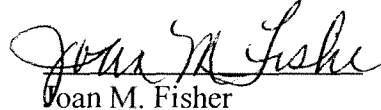
c. That Mr. Stuart is exempt from paying the estimated reporter's transcript fees because he was indigent before trial and has been ever since;

d. That Mr. Stuart is exempt from paying the estimated clerk's record fees because he was indigent before trial and has been ever since;

e. That Mr. Stuart is exempt from paying the appellate filing fee because he was indigent before trial and has been ever since; and

f. That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20, namely, the Clearwater County Prosecuting Attorney and the Attorney General for the State of Idaho.

Dated this 14<sup>th</sup> day of June, 2007.



Joan M. Fisher  
Oliver Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
208-883-0180

**CERTIFICATE OF SERVICE**

I, Julie Brudie, hereby certify that on the 5<sup>th</sup> day of June, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, first class postage prepaid where applicable, addressed to:

Lori Gilmore  
Clearwater County Prosecuting Attorney  
P.O. Box 2627  
Orofino, Idaho 83544

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L. LaMont Anderson  
Attorney General's Office  
P.O. Box 83720  
Boise, Idaho 83720-0010

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Cindy Leonhardt  
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Boise, ID 83701-2636

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☐ Hand Delivery  
☐ Facsimile  
☐ Overnight Mail

Julie Brudie

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
IDaho, IDAHO

2007 APR 30 P 3:48

CASE NO. W02-443

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

**GENE FRANCIS STUART,**

**Petitioner,**

**v.**

**STATE OF IDAHO,**

**Respondent.**

**Case No. CV02-00443**


**ORDER**

Having duly considered Petitioner's *Motion That Costs Of Appeal Be At County Expense*,

**IT IS HEREBY ORDERED THAT:**

All costs of appeal to the Idaho Supreme Court in the instant matter, including the costs of the Reporter's Transcript and the Clerk's Record, shall be at county expense.

Entered this 25<sup>th</sup> day of April, 2007.

  
RONALD D. SCHILLING  
District Judge

**ORDER -1**

00000381

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a full, true and correct copy of the foregoing Order was personally delivered or mailed this 30th day of April, 2007, by first-class mail with prepaid postage to the following:

Joan M. Fisher  
Oliver Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
317 West 6th Street, Suite 204  
Moscow, Idaho 83843

☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile  
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Lori Gilmore  
Clearwater County Prosecuting Attorney  
P.O. Box 2627  
Orofino, Idaho 83544

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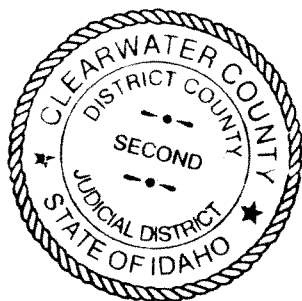
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P.O. Box 2636  
Boise, ID 83701-2636

☒ U.S. Mail  
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☐ Overnight Mail

Robin Christensen, Clerk

By: Sue K. Sammerston  
Deputy



ORDER -2

00000382

Joan M. Fisher  
Idaho State Bar No. 2854  
Oliver W. Loewy  
Limited Admission  
Capital Habeas Unit  
Federal Defender Services of Idaho  
317 West 6<sup>th</sup> Street, Suite 204  
Moscow, ID 83843  
208-883-0180

✓  
JUDICIAL DISTRICT COURT  
CLEARWATER COUNTY  
ID  
2002 12 27 10 46  
CV02-00443  
SJA

Attorneys for Petitioner Gene F. Stuart

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

<b>GENE FRANCIS STUART,</b>	)	
	)	<b>Case Nos. CV02-00443</b>
<b>Petitioner-Appellant,</b>	)	
	)	
<b>v.</b>	)	<b>MOTION THAT COSTS OF</b>
	)	<b>APPEAL BE AT COUNTY</b>
<b>STATE OF IDAHO,</b>	)	<b>EXPENSE</b>
	)	
<b>Respondent.</b>	)	
_____	)	

Mr. Gene F. Stuart ("Petitioner"), pursuant to Idaho Appellate Rule 17 and Idaho Code Section 19-4904, moves that the Court order that all costs of appeal, including the costs of the Reporter's Transcript and the Clerk's Record, shall be at county expense. In support of this motion, Mr. Stuart states as follows:

1. Since October, 1981, Idaho courts have determined that Mr. Stuart is indigent and unable to pay litigation costs in the prosecution, appeals, and postconviction petitions relating to his prosecution in the Second Judicial District, County of Clearwater, District Court Case No. CV02-00443. Mr. Stuart has been incarcerated since September, 1981.

**MOTION THAT COSTS OF  
APPEAL BE AT COUNTY EXPENSE - 1**

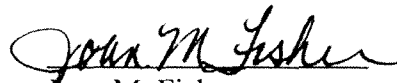
00000383

2. To the best of undersigned counsel's knowledge Mr. Stuart remains and shall continue to remain throughout the appellate proceedings in the instant matter an indigent person with no means of support or ability to pay the costs of these proceedings.

3. The federal and state constitutional rights to counsel, to due process, to equal protection, and against cruel and unusual punishment guarantee Mr. Stuart the right to appeal the denial of postconviction relief in his capital case. U.S. Const. amend. VI, VII, XIV; Idaho Const. art. I, §§ 2, 6, 13

WHEREFORE, Petitioner respectfully requests that the Court enter an Order directing that all costs of appeal, including the costs of the Reporter's Transcript and the Clerk's Record, shall be at county expense.

Dated this 23d day of April 2007.



Joan M. Fisher  
Oliver Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
208-883-0180

**CERTIFICATE OF SERVICE**

I, Julie BRUDIE, hereby certify that on the 23<sup>rd</sup> day of April, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, first class postage prepaid where applicable, addressed to:

Lori Gilmore  
Clearwater County Prosecuting Attorney  
P.O. Box 2627  
Orofino, Idaho 83544

☒ U.S. Mail  
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☐ Overnight Mail

L. LaMont Anderson  
Attorney General's Office  
P.O. Box 83720  
Boise, Idaho 83720-0010

☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile  
☐ Overnight Mail

Cindy Leonhardt  
Court Reporter  
M&M Court Reporting Service Inc.  
P.O. Box 2636  
Boise, ID 83701-2636  
(March 3, 2004)

☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile  
☐ Overnight Mail

Julie Brudie

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2007 JUL 25 A 11:12

CASE NO. CV2002-443

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF BY [Signature] DEPUTY  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

GENE FRANCIS STUART,	)	CASE NO. CV2002-00443
	)	CR1981-8495
Petitioner-Appellant,	)	DOCKET #34198, #34199
	)	
v.	)	NOTICE OF LODGING
	)	REPORTERS TRANSCRIPT
STATE OF IDAHO,	)	AND CLERK'S RECORD
	)	
Respondent.	)	

NOTICE IS HEREBY GIVEN that on July 25, 2007, the Clerk's Record and Reporters Transcripts were lodged in the above-referenced appeal.

The parties shall have twenty-eight (28) days from the date of service of the appeal record to file any objections, together with a Notice of Hearing, with the District Court. If no objection is filed, the record will be deemed settled and will be filed with the Supreme Court.

If there are multiple (Appellants) (Respondents), I will serve the record, and any transcript, upon the parties upon receipt of a stipulation of the parties, or court order stating which party shall be served. If no stipulation or order is filed in seven (7) days, I will serve the party whose name appears first in the case title.

NOTICE OF LODGING OF SUPPLEMENTAL REPORTER'S  
TRANSCRIPT AND CLERK'S RECORD - 1

00000386





ROBIN CHRISTENSEN, Clerk

By Sue K. Summerston  
Deputy

Cc: Clerk of the Court  
Idaho Supreme Court  
P.O. Box 83720  
Boise, ID 83720-0101

NOTICE OF LODGING OF SUPPLEMENTAL REPORTER'S  
TRANSCRIPT AND CLERK'S RECORD - 1

00000387

**JOAN M. FISHER**  
 ID Bar No. 2854  
**OLIVER W. LOEWY**  
 Limited Admittee  
 Capital Habeas Unit  
 Federal Defender Services of Idaho  
 317 West 6<sup>TH</sup> Street, Suite 204  
 Moscow ID 83843  
 Telephone: 208-883-0180  
 Facsimile: 208-883-1472

Attorneys for Gene F. Stuart

CLERK-DISTRICT COURT  
 CLEARWATER COUNTY  
 OROSE, IDAHO

2007 AUG 22 P 9:43

CASE NO. CV02-473  
 CR81-8495

DSH DESK

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR CLEARWATER COUNTY**

<b>GENE FRANCIS STUART,</b>	)	<b>Case No. CV-02-00473</b>
<b>Petitioner,</b>	)	
	)	
	)	<b>MOTION FOR EXTENSION OF TIME )</b>
<b>v.</b>	)	<b>IN WHICH TO FILE OBJECTIONS</b>
	)	<b>TO CLERK'S RECORD</b>
	)	<b>AND REPORTER'S TRANSCRIPTS</b>
	)	
<b>STATE OF IDAHO,</b>	)	
<b>Respondent.</b>	)	
_____	)	

<b>STATE OF IDAHO,</b>	)	<b>Case No. CR-1981-08495</b>
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>MOTION FOR EXTENSION OF TIME</b>
	)	<b>IN WHICH TO FILE OBJECTIONS</b>
	)	<b>TO CLERK'S RECORD</b>
<b>GENE FRANCIS STUART,</b>	)	<b>AND REPORTER'S TRANSCRIPTS</b>
<b>Defendant.</b>	)	
_____	)	

Gene F. Stuart, Petitioner in the above-captioned actions, hereby moves for extensions in

**MOTION FOR EXTENSION OF TIME IN WHICH  
 TO FILE OBJECTIONS TO CLERK'S RECORD  
 AND REPORTER'S TRANSCRIPTS**

00000388

time to September 25, 2007, by which the parties may file, pursuant to Idaho Appellate Rule 29(a), objections to the Clerk's Records and Reporters' Transcripts. In making these motions, he relies on the accompanying declaration as well as state and federal right to due process.

Dated this 21<sup>st</sup> day of August, 2007.

Respectfully submitted,



Joan M. Fisher  
Oliver W. Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
208-883-0180

Attorneys for Petitioner/Appellant Gene F. Stuart

**JOAN M. FISHER**  
ID Bar No. 2854  
**OLIVER W. LOEWY**  
Limited Admittee  
Capital Habeas Unit  
Federal Defender Services of Idaho  
317 West 6th Street, Suite 204  
Moscow ID 83843  
Telephone: 208-883-0180  
Facsimile: 208-883-1472

Attorneys for Gene F. Stuart

JOAN M. FISHER  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
GROFENO, IDAHO

2007 AUG 22 A 9:43

CASE NO. CV-02-443  
CV-02-473  
BY CR-81-8495 DEPT

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR CLEARWATER COUNTY**

**GENE FRANCIS STUART,**  
Petitioner,

v.

**STATE OF IDAHO,**  
Respondent.

Case Nos. CV-02-00443 ✓  
CV-02-00473

**AFFIDAVIT IN SUPPORT OF  
MOTION FOR EXTENSION OF TIME  
IN WHICH TO FILE  
OBJECTIONS TO CLERK'S RECORD  
AND REPORTER'S TRANSCRIPTS**

**STATE OF IDAHO,**  
Plaintiff,

v.

**GENE FRANCIS STUART,**  
Defendant.

Case No. CR-1981-08495

**AFFIDAVIT IN SUPPORT OF  
MOTION FOR EXTENSION OF TIME  
IN WHICH TO FILE  
OBJECTIONS TO CLERK'S RECORD  
AND REPORTER'S TRANSCRIPTS**

I, Joan M. Fisher, state that the following is true to the best of my knowledge and belief,  
under penalties of perjury:

**AFFIDAVIT IN SUPPORT OF MOTION FOR EXTENSION  
OF TIME IN WHICH TO FILE OBJECTIONS TO CLERK'S RECORD  
AND REPORTER'S TRANSCRIPTS**

00000390

I am the Supervising Attorney for the Capital Habeas Unit and have been advised by Oliver W. Loewy, primary counsel responsible for the above-captioned cases, the following state of the record in these matters:


1. This postconviction action seeks guilt and sentencing phase relief primarily based on *Ring v. Arizona*, 536 U.S. 584 (2002).
2. My office received, via the United Parcel Service, the Reporter's Transcript and Clerk's record in each of the above matters on July 26, 2007.
3. As the Court is aware, Mr. Stuart is the petitioning party in each of the above three captioned cases, and all three cases arise out of his 1981 first degree murder conviction and death sentence.
4. With regard to Case No. CV-02-00443, the Reporter's Transcript appears to include a full transcript of each of the court proceedings in the above-captioned matter. As well, it appears to include no transcripts of any earlier court proceeding.
5. The Clerk's Record in Case No. CV-02-00443 includes a variety of documents *not* filed in this matter, including (a) sealed documents which Petitioner filed in the other two above captioned cases (Case Numbers CV-02-00473 and CR-1981-08495), (b) a document which purports to be a list of jury trial exhibits, (c) a document which purports to be a list of preliminary hearing exhibits, and (d) a list of the State's exhibits from an April, 1992, hearing.
6. The Clerk's Record in Case Numbers CV-02-00473 and CR-1981-08495 appears to be missing appendices to Mr. Stuart's *Petition For Postconviction Relief and Petition For*

AFFIDAVIT IN SUPPORT OF MOTION FOR EXTENSION  
OF TIME IN WHICH TO FILE OBJECTIONS TO CLERK'S RECORD  
AND REPORTER'S TRANSCRIPTS

*Writ of Habeas Corpus*. While some of the appendices to that document were sealed, none appear to be included in the Clerk's Record. Similarly, appendices A-D to Petitioner's March 3, 2003, *Affidavits In Support Of Petition For Postconviction Relief*. Additional documents appear to be missing, as well.

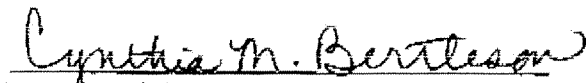
7. In a telephone conversation with Oliver W. Loewy, the attorney with my office primarily responsible for Mr. Stuart's cases, opposing counsel L. LaMont Anderson discussed the state of the Clerk's Record and agreed that an extension in time to September 25, 2007, would allow a fully adequate examination of the Clerk's Records in these three matters and the filing of the parties' respective objections. Of course, with further examination, the parties may be able to stipulate to the Clerk's Record.

Dated this 21<sup>st</sup> day of August, 2007.

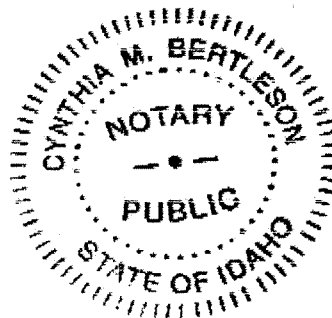
  
Joan M. Fisher  
Oliver W. Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
208-883-0180

Attorneys Petitioner/Appellant for Gene F. Stuart

Sworn before me this 21<sup>st</sup> day of  
August, 2007.

  
Notary Public for the State of Idaho

My commission expires: 8-8-12



AFFIDAVIT IN SUPPORT OF MOTION FOR EXTENSION  
OF TIME IN WHICH TO FILE OBJECTIONS TO CLERK'S RECORD  
AND REPORTER'S TRANSCRIPTS

**CERTIFICATE OF SERVICE**

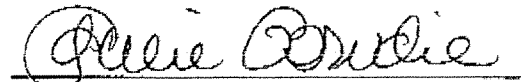
I hereby certify that on the 21<sup>st</sup> day of August, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, addressed to:

L. LaMont Anderson  
Deputy Attorney General  
Idaho Attorney General's Office  
Chief, Capital Litigation Unit  
Statehouse Mail, Room 10  
PO Box 83720  
Boise ID 83720-0010

☒ U.S. Mail  
☐ Hand Delivery  
☒ Facsimile  
☐ Overnight Mail

Lori M. Hood - Gilmore  
Clearwater County Prosecuting Attorney  
P.O. Box 2627  
Orofino, ID 83544

☒ U.S. Mail  
☐ Hand Delivery  
☒ Facsimile  
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Julie Brudie

08/21/2007 17:06

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CAPITAL HABEAS UNIT

 PAGE 08/19  
 CLERK-DISTRICT COURT  
 CLEARWATER COUNTY  
 ORFING. IDAHO

2007 AUG 22 A 10:48

CV-02-00443

CASE NO. CV-02-00473

CR-1981-08495

DEPT

SIS

 IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR CLEARWATER COUNTY

 GENE FRANCIS STUART,  
 Petitioner,

v.

 STATE OF IDAHO,  
 Respondent.

 Case Nos. CV-02-00443  
 CV-02-00473

ORDER

 STATE OF IDAHO,  
 Plaintiff,

v.

 GENE FRANCIS STUART,  
 Defendant.

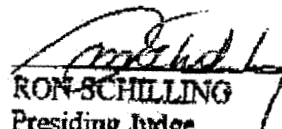
Case No. CR-1981-08495

ORDER

Having considered Petitioner/Defendant's Motion For Extension Of Time In Which To  
 File Objections To Clerk's Record and Reporter's Transcript in each of the above-captioned  
 matters and all their premises, IT IS HEREBY ORDERED:

The time by which each party must file any objections to the Clerk's Record and  
 Reporter's Transcript in any of the above-captioned matters is hereby extended to and including  
 September 25, 2007.

 DATED this 21<sup>st</sup> day of August, 2007.

  
 RON SCHILLING  
 Presiding Judge

ORDER

1

00000394



**CERTIFICATE OF SERVICE**

I hereby certify that on the 22<sup>nd</sup> day of August, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, addressed to:

L. LaMont Anderson  
Deputy Attorney General  
Idaho Attorney General's Office  
Chief, Capital Litigation Unit  
Statehouse Mail, Room 10  
PO Box 83720  
Boise ID 83720-0010

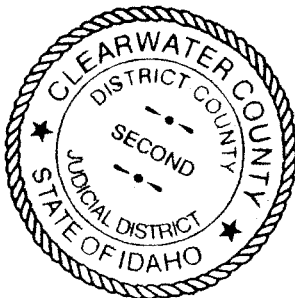
☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile  
☐ Overnight Mail

Lori M. Hood - Gilmore  
Clearwater County Prosecuting Attorney  
P.O. Box 2627  
Orofino, ID 83544

☐ U.S. Mail  
☒ Hand Delivery  
☐ Facsimile  
☐ Overnight Mail

Joan Fisher  
Oliver Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
317 W. 6<sup>th</sup> Street, Suite 204  
Moscow, ID 83843

☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile  
☐ Overnight Mail



See K. Summerton  
Deputy Clerk

CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
GRAND, IDAHO

**JOAN M. FISHER***ID Bar No. 2854***OLIVER W. LOEWY***Limited Admittee*

Capital Habeas Unit

Federal Defender Services of Idaho

317 West 6<sup>th</sup> Street, Suite 204

Moscow ID 83843

Telephone: 208-883-0180

Facsimile: 208-883-1472

2007 SEP 25 P 2:28

CASE NO. 1981-8495  
W02-443BY Sfg

Attorneys for Petitioner/Appellant Gene F. Stuart

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR CLEARWATER COUNTY**

**GENE FRANCIS STUART,**  
Petitioner,

v.

**STATE OF IDAHO,**  
Respondent.

Case No. CR 1981-8495 &  
CV02-000443  
Supreme Court Nos. 34198 & 34199

Notice of Hearing In Re: Settlement  
of Clerk's Record

**TO: THE PROSECUTING ATTORNEY FOR THE COUNTY OF  
CLEARWATER, STATE OF IDAHO, AND THE ATTORNEY GENERAL  
FOR THE STATE OF IDAHO, AND THE CLERK OF THE DISTRICT  
COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF  
IDAHO.**

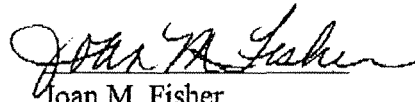
**PLEASE TAKE NOTICE** that pursuant to Idaho Appellate Rules, Rule 29(a), Tuesday,  
October 9, 2007 at 10:00 a.m. P.S.T. is set as the day and time for a hearing on Petitioner's  
Objection To Clerk's Record.

NOTICE OF HEARING IN RE:  
SETTLEMENT OF CLERK'S RECORD -1

00000396

Dated this 25<sup>th</sup> day of September, 2007.

Respectfully submitted,



Joan M. Fisher  
Oliver W. Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
208-883-0180

Attorneys for Petitioner/Appellant Gene F. Stuart

NOTICE OF HEARING IN RE:  
SETTLEMENT OF CLERK'S RECORD -2

00000397

**CERTIFICATE OF SERVICE**

I hereby certify that on the <sup>9<sup>th</sup></sup>25 day of September, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, addressed to:

L. LaMont Anderson  
Deputy Attorney General  
Idaho Attorney General's Office  
Chief, Capital Litigation Unit  
Statehouse Mail, Room 10  
PO Box 83720  
Boise ID 83720-0010

☒ U.S. Mail  
☐ Hand Delivery  
☒ Facsimile  
☐ Overnight Mail

Ms. Lori M. Hood- Gilmore  
Clearwater County Prosecuting Attorney  
P. O. Box 2627  
Orofino, ID 83544

☒ U.S. Mail  
☐ Hand Delivery  
☒ Facsimile  
☐ Overnight Mail

Debbie Briddle

00000398

JOAN M. FISHER

ID Bar No. 2854

OLIVER W. LOEWY

Limited Admittee

Capital Habeas Unit

Federal Defender Services of Idaho

317 West 6<sup>th</sup> Street, Suite 204

Moscow ID 83843

Telephone: 208-883-0180

Facsimile: 208-883-1472

Attorneys for Petitioner/Appellant Gene F. Stuart

2<sup>ND</sup> JUDICIAL DISTRICT COURT  
CLEARWATER COUNTY  
SEP 25 2007

2007 SEP 25 P 2:28

CR 1981-8495  
CV 02-443  
Jes

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR CLEARWATER COUNTY

GENE FRANCIS STUART,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

) Case Nos. CR-1981-08495 &  
) CV-02-00443

) Supreme Court Nos. 34198 & 34199

) NOTICE OF AND OBJECTION  
) TO CLERK'S RECORD

TO: THE PROSECUTING ATTORNEY FOR THE COUNTY OF  
CLEARWATER, STATE OF IDAHO, AND THE ATTORNEY GENERAL  
FOR THE STATE OF IDAHO, AND THE CLERK OF THE DISTRICT  
COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF  
IDAHO.

Undersigned counsel received the Clerk's Record and Reporter's Transcript on or about  
July 26, 2007. Pursuant to Idaho Appellate Rule 29 and his state and federal constitutional  
rights to due process, and by and through counsel, Gene Francis Stuart, objects to the Clerk's  
Record.

NOTICE OF AND OBJECTION TO CLERK'S RECORD  
AND REPORTER'S TRANSCRIPT ON APPEAL -1

00000399

**A. The Clerk's Record Appears To Include Documents Related To But Not Properly Part Of The Instant Matter.**

Capital postconviction proceedings are civil in nature. *Stuart v. Idaho*, 136 Idaho 490, 494 36 P.3d 1278, 1282 (2001). Idaho Appellate Rule 28(b)(1) enumerates the items which the Clerk's Record in a civil case must automatically include. *Id.* That rule's next subdivision, Idaho Appellate Rule 28(b)(2), enumerates the items which the Clerk's Record in a criminal case must automatically include, with item N of subdivision (b)(2) being devoted to criminal appeals in which the death penalty was imposed. In addition to the items which must be included automatically, Idaho Appellate Rule 28(c) provides that the Clerk's Record must include all other documents of certain types which any party requests be included.

On its face, Rule 28(b)(1) is written to apply to original civil actions which do not attack earlier criminal convictions and sentences. The provisions describing documents to be included in the Clerk's Records do not contemplate the inclusion of an entire earlier case file. So, for example, item J of subdivision (b)(1) provides that among the documents to be included is, "A list of all exhibits offered, whether or not admitted.." I.A.R. 28(b)(1) J. The plain meaning of the singular 'list' rather than plural 'lists' is that the exhibits from the postconviction proceeding, not any earlier criminal proceeding, is to be included automatically in the record.

While Mr. Stuart requested, pursuant to Idaho Appellate Rule 28, "that the Clerk's Record include *all* papers filed by each party and *all* orders and minute entries," he did not intend that all exhibits from the underlying criminal proceedings and each earlier postconviction action be included. *Notice of Appeal* (6/6/2007). Rather, in the instant matter he has relied on the Clerk's Record and Reporter's Transcript from those earlier proceedings, and he is confident that having

done so incorporates those papers into this proceeding. Undersigned counsel Oliver Loewy has conferred with opposing counsel L. LaMont Anderson, and Mr. Anderson agrees that to the extent the earlier proceedings need to be relied on in this appeal, the Court may look to those earlier Clerk's Records and Reporter's Transcripts.

Only those pleadings and documents which directly relate to the proceedings in the court below are properly part of the Clerk's Record on appeal. This is especially clear here where rather than reaching the merits of Mr. Stuart's claims, the Court dismissed the case on procedural grounds unrelated to many of the exhibits. However, counsel has received from the Clerk of the Court not only a bound Clerk's Record for this case, but a variety of documents from earlier proceedings in which Petitioner sought postconviction relief. Petitioner assumes that the unbound documents are intended to be part of the Clerk's Record.

In particular, undersigned counsel received a large box on or about July 26, 2007. It contained four bound volumes, two for District Court Nos. CV2002-443 & CR1981-8495 and the other two for Docket No. Court No. CV2002-473. Each of these sets purports to be the Clerk's Record for its corresponding case.

The box received from the Clerk of Court in July 2007 also included these five other sets of documents: (1) a set of binder-clipped documents with a cover sheet stating "Jury Trial Exhibits"; (2) a rubber-banded set of documents with a cover sheet stating "Gene Francis Stuart v. State of Idaho, CR 1981-8495 EVIDENTIARY HEARING -4/6/92" which sheet purports to list the defendant's exhibits from that hearing; (3) a rubber-banded set of documents with a cover sheet stating "Gene Francis Stuart v. State of Idaho, CR 1981-8495 EVIDENTIARY HEARING -4/6/92" which purports to list the plaintiff's exhibits from that hearing; and (4) & (5) two

NOTICE OF AND OBJECTION TO CLERK'S RECORD  
AND REPORTER'S TRANSCRIPT ON APPEAL -3

00000401

rubber-banded sets of documents without any notation regarding their identity, though each appears to contain copies of exhibits from a June, 1999, postconviction evidentiary hearing.

Mr. Stuart objects that the Clerk's Record includes what purports to be exhibits, pleadings, and other documents relating to proceedings commenced and concluded prior to those now under consideration. None of these exhibits, pleadings, and other documents were relied on by the parties or the court in the case at bar. To the extent that these documents are intended to be part of the Clerk's Record in this case, Mr. Stuart requests that they be deleted from it. In particular, Mr. Stuart objects to and hereby requests that all documents not properly part of this case pursuant to Idaho Appellate Rule 28(b)(1) be deleted from the Clerk's Record, including but not limited to:

1. The documents appended behind a sheet labeled "Jury Trial Exhibits." Neither party relied on any of these exhibits, nor did the Court in any apparent way. In any event, these items were *not* exhibits at Mr. Stuart's trial but, instead, at his Preliminary Hearing.
2. Exhibits from a postconviction evidentiary hearing conducted in April, 1992, as part of the proceedings held in relation to an earlier postconviction petition.
3. Exhibits from a postconviction evidentiary hearing conducted in June 1999, as part of the proceedings held in relation to an earlier postconviction petition.

Should the Court deny this objection and request, Mr. Stuart reserves the right to make specific objections and requests regarding each particular document within each of the three categories described above. Were those objections and requests small in number, Mr. Stuart would make them now. However, because of their number, enumerating them now, before the Court has had



an opportunity to consider whether to strike the general categories of documents from the Clerk's Record would be unduly burdensome on the Court and the parties.

Also, to the extent that the Court denies Petitioner's request to delete these documents from the Clerk's Record, he asks that the Clerk's Record be modified in two ways so that it is accurate. First, a number of the copies of exhibits from the postconviction evidentiary hearings appear to be only partial copies. Specifically, it appears that a number of the same exhibits were admitted into evidence at both the 1992 and 1999 hearings. In the Clerk's Record, however, the front page of each of those exhibits appears as the exhibit in the set of exhibits corresponding to one of the evidentiary hearings, whereas it seems the remaining pages of each of those exhibits appear as the exhibit in the set of exhibits corresponding to the other evidentiary hearing. However, while this is undersigned counsel's best guess as to why copies of multiple exhibits from the postconviction evidentiary hearings are incomplete, it is only a guess. Whether that guess is accurate cannot be determined with certainty from the documents themselves. The Court Clerk has provided no statement clarifying the matter. Second, a number of paper exhibits, noted on the postconviction evidentiary hearings' exhibit lists, are wholly absent from the sets of documents relating to the hearings.

#### **B. Documents Missing From The Clerk's Record.**

Petitioner objects that the following documents are missing from the Clerk's Record, and he asks that they be added to it:

- a. Stipulation (re: sealing certain documents) (6/28/07).
- b. Order (re: sealing certain documents) (6/29/07).

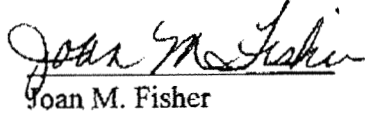
NOTICE OF AND OBJECTION TO CLERK'S RECORD  
AND REPORTER'S TRANSCRIPT ON APPEAL -5

00000403

03/23/2007 14:13 2000001712

Dated this 25<sup>th</sup> day of September, 2007.

Respectfully submitted,



Joan M. Fisher  
Oliver W. Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
208-883-0180

CERTIFICATE OF SERVICE

I hereby certify that on the 25<sup>th</sup> day of September, 2007, I caused to be served a true and correct copy of the foregoing document by the United States Postal Service, first class postage affixed, addressed to:

L. LaMont Anderson  
Deputy Attorney General  
Chief, Capital Litigation Unit  
P.O. Box 83720  
Boise ID 83720-0010

☒ U.S. Mail  
☐ Hand Delivery  
☒ Facsimile  
☐ Overnight Mail

Ms. Lori M. Hood-Gilmore  
Prosecuting Attorney for Clearwater County  
P.O. Box 2627  
Orofino, ID 83544

☒ U.S. Mail  
☐ Hand Delivery  
☒ Facsimile  
☐ Overnight Mail

Glenn Burdick

00000405

**JOAN M. FISHER***ID Bar No. 2854***OLIVER W. LOEWY***Limited Admittee*

Capital Habeas Unit

Federal Defender Services of Idaho

317 West 6<sup>th</sup> Street, Suite 204

Moscow ID 83843

Telephone: 208-883-0180

Facsimile: 208-883-1472

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
CROFORD, IDAHO

2007 DEC 21 A 8:34

CASE NO.

BY SIL

DEPUTY

Attorney for Petitioner Gene F. Stuart

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER****GENE FRANCIS STUART,**  
Petitioner,

v.

**STATE OF IDAHO,**  
Respondent.

Case No. CV-2002-0000443

Case No. CR-81-0008495

Supreme Court Nos. 34198 &amp; 34199

**STIPULATION REGARDING  
CORRECTION OF CLERK'S  
RECORD**

Petitioner and Respondent stipulate as follows:

1. The exhibit lists as well as any of the exhibits listed therein, C.R.387-93, should be deleted from the Clerk's Record as none were relied on by either party or by the Court in any apparent way during the proceedings relating to either Mr. Stuart's August 2, 2002, *Petition for Post-Conviction Relief and/or Writ of Habeas Corpus* or his contemporaneously filed *Motion To Correct Sentence*. As well, none of those items should be forwarded to the Supreme Court as part of the record in these cases, and the Clerk's Certificate of Exhibits, C.R. 386, should be modified to reflect this change.

**STIPULATION REGARDING CORRECTION OF  
CLERK'S RECORD AND REPORTER'S TRANSCRIPT -1**

00000406

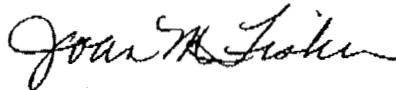
2. None of the sealed statements noted in the Clerk's Certificate of Exhibits, C.R. 386, should be forwarded to the Supreme Court as part of the record in these cases, and the Clerk's Certificate should be modified to reflect this change. Those sworn statements were offered and admitted only in Case No. CV-2002-473, *not* in either of the cases at bar.
3. The following documents should be added to the Clerk's Record<sup>1</sup>:
  - a. **Sealed** Stipulation (re: sealing certain documents) (6/28/07);
  - b. *Order* (re: sealing certain documents) (6/29/07).

Dated this 12 day of December, 2007.

Respectfully submitted,



L. LaMont Anderson



Joan M. Fisher  
Attorney for Petitioner

---

<sup>1</sup>These additions may seem inconsistent with paragraph number 2, and they would be except that the parties filed the stipulation not only in Case No. CV-2002-473 but in the instant cases as well. The parties note that Petitioner filed in the instant cases none of the statements referenced in the sealed stipulation.

**CERTIFICATE OF SERVICE**

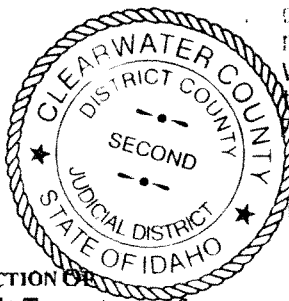
I certify that on the 20<sup>th</sup> day of December, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, first class postage prepaid where applicable, addressed to:

Lawrence G. Wasden  
Idaho Attorney General

L. LaMont Anderson  
Deputy Attorney General  
Capital Litigation Unit  
P.O. Box 83720  
Boise, Idaho 83720-0010

☒ U.S. Mail  
☐ Hand Delivery  
☒ Facsimile  
☐ Overnight Mail

Julie Brulie



STATE OF IDAHO County of Clearwater  
I hereby Certify that the foregoing is a full, true, and correct copy of an instrument as the same now exists on file and of record in my office.

WITNESS my hand and official seal hereto affixed  
this 31<sup>st</sup> day of Jan AD. 2008

ROBIN CHRISTENSEN, CLERK OF THE DISTRICT  
COURT EX OFFICIO AUDITOR & RECORDER

by Deputy Sue K. Sammon

STIPULATION REGARDING CORRECTION OF  
CLERK'S RECORD AND REPORTER'S TRANSCRIPT -3

00000408

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2008 JAN -2 P 1:55

CW02-443  
CASE NO. CR81-8495

BY SIS DEPUTY

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

<b>GENE FRANCIS STUART,</b>	)	<b>Case No. CV-2002-0000443</b>
<b>Petitioner,</b>	)	<b>Case No. CR-81-0008495</b>
	)	
	)	<b>Supreme Court Nos. 34198 &amp; 34199</b>
<b>v.</b>	)	
	)	<b>ORDER REGARDING</b>
	)	<b>CORRECTION OF CLERK'S</b>
<b>STATE OF IDAHO,</b>	)	<b>RECORD</b>
<b>Respondent.</b>	)	
_____	)	

The Court, having conducted a hearing on Petitioner's *Objections to the Clerk's Record and Reporter's Transcript on Appeal* and having reviewed the *Stipulation Regarding Correction of Clerk's Record* submitted by the parties in this matter, hereby orders that:

1. The exhibit lists as well as any of the exhibits listed therein, C.R.387-93, shall be deleted from the Clerk's Record. As well, none of those items shall be forwarded to the Supreme Court as part of the record in these cases, and the Clerk's Certificate of Exhibits, C.R. 386, shall be modified to reflect this change.
2. None of the sealed statements noted in the Clerk's Certificate of Exhibits,

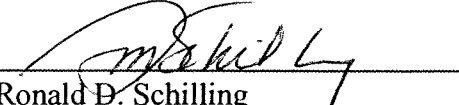
ORDER REGARDING CORRECTION  
OF CLERK'S RECORD

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C.R.386, shall be forwarded to the Supreme Court as part of the record in these cases, and the Clerk's Certificate shall be modified to reflect this change.

3. The Clerk's Certificate of Exhibits, *see* C.R. 386, shall be modified to reflect that none of the sealed sworn statements noted therein are being forwarded to the Supreme Court as part of the record in these cases and the sworn statements themselves shall be entirely removed from the Clerk's Record.
4. The following documents shall be added to the Clerk's Record:
  - a. **Sealed** Stipulation (re: sealing certain documents) (6/28/07);
  - b. *Order* (re: sealing certain documents) (6/29/07).

Dated this 26<sup>th</sup> day of December, 2007.

  
\_\_\_\_\_  
Ronald D. Schilling  
Idaho District Court Judge



**CERTIFICATE OF SERVICE**

I certify that on the 3<sup>rd</sup> day of January 2008, I caused to be served a true and correct copy of the foregoing document by the method indicated below, first class postage prepaid where applicable, addressed to:

Lawrence G. Wasden  
Idaho Attorney General

L. LaMont Anderson  
Deputy Attorney General  
Capital Litigation Unit  
P.O. Box 83720  
Boise, Idaho 83720-0010

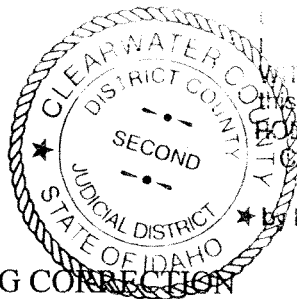
☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile  
☐ Overnight Mail

Joan M. Fisher  
Oliver W. Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
317 West 6<sup>th</sup> Street, Suite 204  
Moscow ID 83843

☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile  
☐ Overnight Mail

Carrie Bird, Clerk

Sue K. Summerton  
Deputy



County of Clearwater, State of Idaho, do hereby certify that the foregoing is a true and correct copy of an instrument as the same appears on file and of record in my office.  
WITNESS my hand and official seal hereunto at this 3<sup>rd</sup> day of Jan AD. 2008  
ROBIN CHRISTENSEN, CLERK OF THE DISTRICT COURT EX OFFICIO AUDITOR & RECORDS

by Deputy Sue K. Summerton

ORDER REGARDING CORRECTION  
OF CLERK'S RECORD

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

GENE FRANCIS STUART,	)	CASE NO. CR1981-8495, CV2002-443
	)	DOCKET #34198, #34199
Petitioner/Appellant,	)	
	)	CLERK'S CERTIFICATE
Vs.	)	OF EXHIBITS
	)	
STATE OF IDAHO,	)	
	)	
Respondent,	)	
	)	

I, ROBIN CHRISTENSEN, Clerk of the District County of the Second Judicial District of the State of Idaho, in and for the County of Clearwater, do hereby certify:

That the following is a list of lodged document which are being forwarded to the Supreme Court as Exhibits in this cause:

EXHIBITS: none

LODGED DOCUMENTS:

Transcript of telephonic status conference 1/6/06.  
Transcript of scheduling conference 3/30/06.  
Transcript of motion hearing 5/22/06.  
Transcript of scheduling conference 3/3/04.

SEALED:

Stipulation filed 6/28/07  
Order filed 7/2/07

25<sup>th</sup> IN WITNESS WHEREOF, I have hereunto set my hand and official seal this  
day of January, 2008.

CARRIE BIRD  
Clerk of the District Court

BY: Sue K. Summerton  
Deputy

CLERK'S CERTIFICATE  
OF EXHIBITS

00000412

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

GENE FRANCIS STUART,	)	CASE NO. CV1981-8495, CV2002-443
	)	DOCKET #34198, #34199
Petitioner/Appellant,	)	
	)	CLERK'S CERTIFICATE
Vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

I, Sue K. Summerton, Deputy Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Clearwater, do hereby certify that the above and foregoing record in the above entitled cause was compiled and bound under my direction as, and is a true, full and correct record of the pleading and documents under Rule 28 of the Idaho Appellate Rules.

I further certify that all documents lodged, including briefs, in the above entitled cause will be duly lodged as Exhibits with the Clerk of the Supreme Court, along with the Court Reporter's Transcript, if requested, and Clerk's Record.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Orofino, Idaho this 25th day of January, 2008.

CARRIE BIRD  
Clerk of the District Court



By: Sue K. Summerton  
Deputy

CLERK'S CERTIFICATE

00000413

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

GENE FRANCIS STUART,	)	CASE NO. CR1981-8495, CV2002-443
	)	DOCKET #34198, 34199
Petitioner/Appellant,	)	
	)	CERTIFICATE OF SERVICE
Vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

I, Sue K. Summerton, Deputy Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Clearwater, do hereby certify that I have personally served or mailed, by United States mail, postage prepaid, on copy of the Clerk's Record and Reporter's Transcript if, a transcript was requested, to each of the parties or their Attorney of Record as follows:

Joan M. Fisher  
Olivery Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
317 West 6<sup>th</sup> Street, Suite 204  
Moscow, ID 83843

Lori Gilmore  
Clearwater County Prosecutor's Office  
P.O. Box 2627  
Orofino, ID 83544

L. LaMont Anderson  
Attorney General's Office  
P.O. Box 83720  
Boise, ID 83720-0010

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal of the said Court this 25<sup>th</sup> day of January, 2008.

CARRIE BIRD,  
Clerk of the District Court

By:

Sue K. Summerton

Deputy Clerk

CERTIFICATE OF SERVICE

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